The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition From Nuremberg to East Timor)

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INTRODUCTION

There is no authoritative or conclusive definition of what is encompassed within the subject matter of laws of evidence and procedure in international criminal law. This paper however, will argue the point that the absence of clear standards or precedents, emphasise the need for a more methodical and systematic judicial framework for the operation of international criminal law practice.

As a definitional starting point, what is meant by 'rules of evidence and procedure' is: a body of rules that deal with the means by which "people's rights and duties may be declared, vindicated or enforced' and in the alternative "remedies for their infraction secured."[1] Rules which govern the admission of evidence, and adherence to procedure, in a criminal trials can be said to promote the general promise of due process before the law, and separate the trial process from what might be regarded as merely interest, ingenuity, or unrestrained power.

However, the interpretation of what these rules might contain, and how they might translate, is variably expressed through out a heterogeneous world, consisting of a multiplicity of legal traditions.[2]

It is however a generally accepted principle that any criminal jurisdiction, be it national or international, common law or civil law, must extend to an accused a system of justice that is both regular and fair, in accordance with quantifiable external measure. Without fixed standards, a criminal trial becomes a public demonstration, or general inquest, where extraneous and improper considerations might impact upon the ultimate verdict.

In a criminal trial the accused appeals is to the disinterested judgment of the court, guided by established precepts. If in the end, there is a generally accepted view that a trial was an example of high politics masquerading as law, then the trial may retard the principles of a fair trial, if not constitute a total denial of justice.[3] Put another way, a criminal trial can be distinguished from naked power, by pointing to the method it employed in order to adjudicate the disputation.

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[1] Walker, D.M. The Oxford Companion to Law, Clarendon Press, Oxford, 1980, 24 1195

[2] There are various legal families of law including Common Law, Civil Law, Socialist Law, Canon Law, Islamic Law, Roman Law, Feudal Law and Equity Law.

[3] "The standards in international law that define the denial if justice are unfortunately vague" see Wright Q Due Process in International Law. Vol 40 *AJIL* 1946 p. 398 at . 406

The adherence to accepted procedures, and the application of rules and legal reasoning by independent judges are what separate a legal institution from its political context, and what we generally refer to as *due process*. [4]

International law has traditionally set a less precise standard of 'due process' than domestic law,[5] due in part to the fact that a synthesis of the technical rules employed by the civilised world is difficult, owing to the disparate nature of state practice. Herein lies a dilemma. The international rule of law described by Brownlie[6], relies upon the maintenance of the basic norms of due process. Much of the literature and jurisprudence of international law draws a close nexus between the international rule of law and the imperative to meet standards of procedural fairness. In deed the general consensus is that the concepts are interdependent.[7]

Notwithstanding the fact that today certain due process protections have been incorporated into international criminal law instruments, the evolution of international due process *sui generis* norms, purport to present higher legal values.[8] That is to say, "the rule of law is much more than the application of existing norms, but must involve an assessment of the quality of the legal norms"[9]

The author Gerry .J.Simpson in his essay *War Crimes; A Critical Introduction* remarks that " it is clear in an area of law so politicised, culturally freighted and passionately punitive as war crimes there is a need for even greater protections for the accused".[10] To this end, rules of evidence and procedure in international criminal trials are an essential devise in limiting and guiding the exercise of judicial powers.

So when we talk about a fair trial what do we mean? What is this legal concept of 'fairness'? Well the short answer is that 'fairness' is as contentious as it is elusive.

What is fairness?

Central to the concept of fairness is the relationship of power exercised by the court vis-a-vis the individual.

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[4] Blackman, R. J., Supplemental Paper; There There: Defending the Defenceless with Procedural Law, 37 *Arizona Law Review.* 285

[5] Wright Q Due process in International Law Vol 40 AJIL (1945) p398 at p402

[6] Brownlie, I., The Rule Of Law in International Affairs (1998) p28

[7] Allen F. A., *The Habits of Legality Criminal Justice and the Rule of Law*. (1996) p14. Francis Allen states unambiguously that "The notion of the rule of law is one that seeks to impose limits on and provide guidance for the exercise of official power"

[8] Note Brownlie proposed 5 key elements of the rule of law (see Brownlie at pp213-214). The second key element he states is that; "the law itself must conform to certain standards of justice both substantial and procedural". As such, assessing the quality of international legal proceedings for standards of substantive procedural justice, is of particular relevance in assessing whether fundamental objects and purposes of proceeding are being met, as well as whether the overall international rule of law has been maintained

[9] Brownlie, I., The Rule Of Law In International Affairs (1998) at p 1

[10] Simpson, G.J. War Crimes: A Critical Introduction in T.L.H. McCormack & G.J. Simpson (eds) The Law Of War Crimes (1997)

As the general claim, a judicial system must not be characterised by random outcomes or disparate results for a similarly situated defendant, or class thereof.

Fairness and Equality

Fairness in procedural terms, principally aims to achieve equality before the law. That is, both equality between the parties, and equality of treatment with other defendants.
Fairness in evidentiary terms attempts to regulate evidence that is unreliable or prejudicial, the admission of which would be antithetical to the trial process.[11] Fairness in procedural terms, is an attempt to administer the law so that both parties may be treated in an even handed and equal manner. It is a virtue of any criminal justice system, that extend to every defendant Equal treatment before the law, including equality between guilty persons.

Fairness and Morality

For H.L.A. Hart, the concept of fairness plays a specific role within the general scheme of morality ;

> *The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair'. Fairness is plainly not coextensive with morality in general; references to it are mainly relevant to it in two situations in social life. One is and when we are concerned not with a single individual's conduct but with the way in which classes of individuals are treated, when some broken or benefit falls to be distinguished among them. Hence what is typically fair or unfair is a 'share'. The second situation is when some injury has been done and compensation for redress is claimed*.[12]

"The morality of fairness is the morality of comparison"[13] Thus, the concept of fairness has a moral component, because its meaning implies the making of a moral comparison. We judge fairness then, in terms of a relative comparison, or the treatment of one person relative to others. In the criminal trial process, this means that we compare the relative treatment of defendants.

When defendants appeal to fairness, he/she is appealing to the right to similar treatment. To this, procedural requirements and evidentiary rules serve as objective standards

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[11] It is however, less evident, whether reliable and/or non prejudicial evidence ought to be allowed in circumstances where admission would be unfair to defendant (ie; forced confession, abuse of process or evidence obtained in an illegal or improper manner.) The common law courts are divided on the issue of whether evidence that would otherwise be probative, be excluded for public policy reasons. For discussion of this See; Prof. E. Colvin, 'Conceptions of Fairness in the Criminal Process' Occasional Paper delivered at the International Society for the Reform of Criminal Law Conference, 9 July 2004, copy at ; http://www.isrcl.org/papers/colvin.pdf

[12] Hart, H.L.A., *The Concept of Law* (1961) at page 154.

[13] Colvin, Prof. E., 'Conceptions of Fairness in the Criminal Process' Occasional Paper delivered at the International Society for the Reform of Criminal Law Conference, 9 July 2004, copy at ; http://www.isrcl.org/papers/colvin.pdf

against which fairness is measured. As such, Equality of treatment is widely regarded as a core value of any criminal justice system.[14]

Fairness and Objectivity

In order to make comparisons, an inherent requirement of fairness is that a criminal trial is objective. Notwithstanding the fact that every society will have a different concept of what is 'objective' and what is 'objectively fair', (determined by cultural, economic, social, historical, religious and other factors), a trial should begin from the outset with a sufficiently clear set of judicial criteria that must be met.[15] Aspects of objectivity might include an assessment of whether the trial has the appearance of accomplishing justice, whether sufficient facts have been adduced to satisfy a conviction on the charge, whether the appropriate and relevant law was applied or whether the correct procedure has been followed. Procedural and evidentiary rules are central to the guarantee of objectivity in trial proceedings, since they are quantifiable and measurable. In addition, because they set out the rules of engagement in advance, they give an assurance against arbitrariness or impartiality.

Fairness and Impartiality

Objectivity and impartiality are related concepts. When we talk of an impartial trial we mean that the presiding judge, or trier of fact, is not permitted to favour one party, or prejudge a matter in advance of hearing all the evidence. Impartiality describes the attitude of the court to the parties, the opportunity afforded the parties in presenting their case, and the approach adopted by the court to the admission and assessment of the evidence. Central to the concept of impartiality is the essential condition that the court is independent, and it evaluations free from outside influence. If a trial outcome is influenced by factors outside the frame of reference of proceedings, fair trial guarantees are rendered ineffective.[16]

Since any precise assessment of similarity of treatment is impractical, we are confined to making reasonable judgment that a judicial process lies somewhere between an equivalent or uniform application of legal procedure, and a sham. It is not a science, but rather a tracing of patterns of conduct in an effort to bare out the inconsistencies, discrimination and/or arbitrariness.

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[14] In AG Canada v Lavell (1974) 38 DLR (3d) 481 at 495, it was held that the equality before the law is defined as " the equality in the administration or application law under law enforcement authorities and the ordinary courts in the land".

[15] Note that each of these objective determinants do not constitute a complete assurance on their own, nor does the absence of one of more automatically signify a unfair trial. Rather, they combine and collectively contribute to the achievement of a fair trial.

[16] Bhattacharyya, R., "Establishing a Rule of Law International Criminal Justice System", 31 *Texas International Law Journal* 57 at 62 see also; John Rawls *Theory of Justice* (1971) at p58 - where he states that 'formal justice' demands that "..similar cases be treated similarly…[and that the] correct rule as defined by institutions is regularly adhered to and properly interpreted by authorities. This impartial and consistent administration of law and institutions …we may call formal justice" ie; For Rawls this regular and impartial administration of public rules become the rule of law when applied to the legal system.

On a broad scale we might look for over representation of a class of defendants, arbitrary patterns of application of the law, or randomness in interpretation of rules. On a micro analysis, we might be concerned with individual identifiable breaches of due process standards. Whilst it is conceded that, even an efficient criminal justice system will produce some variance, and that the interplay of variables will turn on the facts of a particular case, these variables should be at an acceptable level.

There are degrees of fairness. On the one hand, it would be ludicrous to suggest that a mere breach of accused rights would generate a legitimate complaint of unfairness. At the other extreme, a complete absence of fairness, will generate a lack of respect for the criminal justice system as a whole, thereby detracting from its moral authority.

Fairness In the context of International Crimes

We can in fact trace many examples international criminal trials where the imperative to meet with a high standard of procedural fairness has been articulated. The International Military Tribunal formed in the wake of World War II at Nuremberg was an innovation that not only heralded the birth of international tribunals, but claimed to symbolise the triumph of reason over power. The victor's boast was; that they afforded the perpetrators of massive injustices, the legal process that they denied their victims.[17] It was the absence of legal process that facilitated the mutation of German society. It would be the enforcement of legal process that would 'excise that mutation'[18]

Though accused of being political show trials, it is arguable that through the adherence to core legal values the final adjudication could be separated from its political context. Whilst its true the victors dispensed the justice and imposed the criminal penalty, they equally exercised restraint on their own use of power. The promotion of the international rule of law and the guarantee of international standards of process and practice, placed the judicial forum beyond the hostile climate that existed towards the defendants at Nuremberg. Efforts towards international process were grounded in tried and true mechanisms of trial, in a forum isolated from the 'vagaries of both international and domestic political considerations.'[19]

If vengeance is an underlying motivation for international prosecution, then it will lead to a response that attempts to satisfy the instincts of revenge and retribution, this is "obviously the least sound basis" for proceeding.[20] If we were to assume the rationale that " crime so offends nature that the earth cries out for vengeance" or that "evil violates a natural harmony which only retribution can restore" or that "a wronged collectivity

[17] See Justice Jackson, opening address for the Prosecution, Nuremberg Trial IMT Vol II

[18] Turley, J. 'Symposium on Trials of the Century; Transformation Justice and the Ethos of Nuremberg', *33 Loyola of Los Angeles Law Review* 655 at 663.

[19] Bhattacharyya, R., Establishing Rule-of-Law in the International Criminal Justice System' , *31 Tex. Int'l L. J. 57 (1996).*

[20] Justice Jackson in a memo

owes a duty to the moral order to punish the criminal" [21] , then international justification for action is ill founded and politically driven.

The imperative to move beyond the political, and ground the proceedings in objectifiably fair standards is perhaps the very reason why the trials at Nuremberg have commended themselves to posterity, and have formed the precedent for contemporary international criminal tribunals, allbethey rudimentary and unsophisticated (as we will see later) .

To his credit, the Chief Prosecutor Justice Robert Jackson, before the International Military Tribunal at Nuremberg, displayed great foresight and prudence when he outlined the international demand for procedural fairness in his address.[22]Jackson recognised that it was paramount that the tribunal was viewed as being procedurally beyond reproach[23] and that it produce sound jurisprudence with universal appeal if its findings were to withstand the rigorous test of time..[24]

Justice Robert Jackson is later attributed with the phrase; *"If you are determined to execute a man in any case there is no occasion for a trial. The world yields no respect to courts that are merely organised to convict"*[25]

This approach has been adopted by the judges of the more contemporary international criminal tribunals. Judge Robinson of the International Criminal Tribunal for the Former Yugoslavia, noted that in analysing the dicta of tribunal decisions,[26] it is significant that; "*one of the objects, if not the fundamental object, of the Statute and Rules (of the ad hoc tribunals) is achieving a fair and expeditious trial*" He went on to say that the "*Trial Chambers have on occasion highlighted the achievement of a fair and expeditious trial as the fundamental purpose of the Statue and Rules."*[27]

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[21] See last page of Tallegren article for citation.

[22] Prosecutor Justice Robert H. Jackson, Trial of the Major War Criminals Before the International Military Tribunal, Address Nov. 21 1945 at p101.

> *We must never forget that the record on which we judge these defendants today, is the record upon which history will judge us tomorrow. To pass these defendants a poised chalice is to put it to our lips as well. We must summons such detachment and intellectual integrity to our task, that this trial will commend itself to posterity as fulfilling humanity's aspiration to do justice*

[23] Jackson makes the point that if there is to be a system of formal justice which promotes due process and freedom from the fear of arbitrary punishment, then the conduct of proceedings must be in a manner so detached as to administer a finding 'not under men but under God and the law' see Bhattacharyya, R., "Establishing a Rule of Law International Criminal Justice System", 31 *Texas International Law Journal* 57 at 62.

[24]Justice Jackson. Secondary source quoted in Amnesty International, The International Criminal Court: Making the Right Choices Part II Report IOR 40/11/97 (July 1997). *There is a dramatic disparity between the circumstances of the accuser and the accused that might discredit our work if we should falter in even minor matters, in being fair and temperate*..

[25] Conot, R.E, Justice in Nuremberg. (1983) at p 14

[26] In particular the decisions of *Prosecutor v Kanyabashi* and *prosecutor v Aleksovski*. Note; The author was legal intern attached to the trial team that was prosecuting the case of *Prosecutor v Aleksovski* and *Prosecutor v Dokmanovic*

[27] Robinson, P., Hon. Justice of the International Criminal Tribunal for the Former Yugoslavia, Public Lecture, 30 September 1999, University of Leiden (LLM Public International Law Program).

This view is expressly adopted in the Appeal Chamber decision in the Tadic case where the court declared: "*An examination of the Statute of the International Tribunal and the Rules of Evidence and Procedure adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the Rule of Law. The fair trial guarantees in Article 14 of the ICCPR have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute of the Rules of Evidence and Procedure. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality and integrity and competence of the judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial."*[28]

Procedural regularity then, is the foundation of a fair trial and the safeguard of the fundamental rights and freedoms guaranteed by various international instruments, and refined by jurisprudence. The dilemma for those who seek to test the application of legal procedure however, is that international legal practice defies a strictly empirical approach. There is no scientific methodology and no means of testing a legal outcomes against whether the explicit purposes have, in fact, been served.

The best we can do, is to look objectively at each individual incident where evidentiary and procedural rules that proscribe conduct are applied, and assess the correctness of administration. [29] In this way, we seek to measure a specific legal outcome against quantifiable rules of evidence and procedure applied through the course of an international criminal trial, in order to critically examine whether the judicial outcome, vindicated or infracted the rights of the accused standing trial.

When we make a broad assessment as to whether a trial is procedurally fair we look to the component parts, and assess adherence to formal requirement. For, Thomas Franck these broad notion of fairness in international law encompass the concepts of both legitimacy (or procedural fairness) and distributive justice (or substantive fairness). For a system to be fair;

> *"… it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied. Among the marks of legitimacy are the determinancy of the legal rules, their symbolic validation through the possession of attributes that mark them out as authoritative, their application in a coherent manner that treat 'like cases alike' and their adherence to secondary rules that govern the creation, interpretation and application of such rules*"[30]

In order to conduct such an inquiry the examiner must first be satisfied as to the purposes of the laws of evidence and procedure, before drawing conclusions as to whether these

[28] Case No IT-94-I-T Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 46

[29] NOTE; This is a procedural natural law position. Substantive Natural Law theorists such as Acquinas, Finnis, believe that the law must fulfil the purpose of facilitating human activity. Whilst Positivists, Austin, Hart, Kelsen and Raz reject the notion that the law has a purposive element

[30] Franck, T.M., "Fairness in International Law and Institutions", quoted in Tasiolas J., "International Law and the Limits of Fairness" 13 European Journal of International law (2002) p 993

purposes have in fact been served. That is to say, the inquirer must settle upon an appropriate theoretical framework.

Theoretical Framework

The general requirement to treat like cases alike, is what Procedural Natural Law theorists hold as being the central underpinning of legal procedure. Hart suggest that an essential element of the concept of justice is the principle of treating similars similarly. Put another way justice requires that the law be administered justly, so we look to the rules that govern procedure in a legal system, to reflect this imperative.

> *Natural procedural justice consists therefore of those principles of objectivity and impartiality in the administration of law which implements just this aspect of law…*[31]

For Procedural Natural Law theorists, the principles of objectivity and non arbitrariness reflected in legal procedure are morally desirable objectives and it is for this reason that we are prevented from treating the law as though it were utterly neutral.

It is morally desirable that we be protected from the exercise of arbitrary power by the state. It is morally desirable that each subject be afforded the same degree of administrative fairness. It is morally desirable that a legal institution articulates, promulgates and adheres to procedures, formulated in accordance with authoritative norms, such that every subject that comes before the law may be judged with disfavour.

> *Procedural natural law then assumes the middle ground, dissolving positivist constraints and permitting the rule of reason to liberate courts from the realm of politics.*[32]

By way of a practical example. If we begin with a morally desirable concept; every person accused of a crime should be afforded an impartial trial . Through a reasoned process this translates to a legal starting point that everyone is presumed innocent until proven otherwise by the state. It is this reasoned concept that forms the foundation of the rules of evidence and procedure that preserve this presumption, and places the burden of proof upon the state to prove the case against the individual. We begin with a moral desirability, reason an appropriate legal framework, that if consistently applied would deliver a just outcome, then codify this framework in positive laws. Courts acting within this framework will treat similar cases similarly and avoid arbitrary decision making.

In *The Concept of Law* British philosopher H.L.A. Hart grappled with the concept of "procedure" in an attempt to describe non circular defining characteristics. Hart

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[31] Ibid. at p77

[32] Lon Fuller writes " *I believe that if we are freed from the inhibitions of positivism, which has taught since Hobbes that fiat must largely take the place of reason in regulating human relations – I believe that if we are freed from this restraint we shall find that reason has capacities we had not suspected in it….All I want is an intellectual atmosphere in which men are free to attempt that discovery"*
Lon Fuller to Thomas Reid Powell (undated) printed in Lon Fuller *The Principles of Social Order* , K.Kingston (ed) 1981, 293 at 303

delineated procedure from substantive law. Primary rules of a legal system that stipulate what a person must do, or abstain from, are what constitute the substantive elements of the law, where as procedural elements roughly correspond with " how these primary rules "may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation determined". Hart then views legal procedure as a secondary set of rules governing the just administration of primary rules.

> *It is, however, true that one essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law.* [33]

For Hart the secondary rules of legal procedure which govern administrative justice, are directed at the officials of the system, such as judges and lawyers, so as to direct and inform human actions.

Jurgen Habermas in his *Moral Consciousness and Communicative Action*, does not discuss the concept of legal procedure directly but does describe his theory of discourse ethics in which he develops the components of cognitivism, universalism and formalism. Habermas in establishing his concept of discourse ethic, *"establishes a procedure based on presuppositions and designed to guarantee the impartiality of the processes of judging."* While Habermas describes an ethical procedure as opposed to a legal procedure, he ultimately produces a criteria similar to the concept of law. Habermas's articulation of formalism is not dissimilar from Hart's development of secondary rules.

Lon Fuller in *Morality of Law*, who is the major exponent of Procedural Natural Law theory, suggests that when a system violates the idea of procedural law, it can no longer claim to be law.

> *"When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statute, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality – when all these things have become true of a dictatorship, it is not hard for me, at least, to deny it the name of law."*[34]

The requirement of rationality in legal procedure is common to writers in the field. If procedural rules are to have general application, they must set out a method of deductive reasoning, inference and evaluation that is considered reliable. In law, this idea of rationality is promoted through the ability, given certain particular data, to relate them to other data in an appropriate methodology. This applied logic, aims to treat each instant of a class of humans, as similar to every other instant of that class, save where purported

[33] H.L.A. Hart, Law and Morals at p.77
[34] Fuller L., *Morality of Law* revised edition 1969.

differences might justify treating them differently. In attempting to treat similars similarly, rationality imports an element of non arbitrariness. In this way, the employed methodology can be explained and justified to a disinterested outside observer.

Fuller sets out 8 principles, or canons, that assist in determining the moral components of procedural law. Procedural law must be 1) general 2) publicly promulgated 3) prospective 4) clear and intelligible 5) free from contradiction 6) constant over time such that people can order their relations accordingly 7) must not require the impossible and; 8) be administered in a manner congruent with their wording. [35]

Legal procedure delineates boundaries where legal compliance ends and extra legal use of power begins, based upon the supposition that constraints placed upon the exercise of power is a desirable end.

This is, the point at which procedural natural law theorist traverse the traditional divide between positivist and natural law theory. If 'mortality is the device that compensates for vulnerability, then procedural requirements of law reflect the accepted conceptual norm that the weak should not be overpowered by the strong. In this way we attribute to an institution moral characteristics and impose moral criteria for judging their activities.

Applying the theory of Procedural Fairness to International Criminal Law

Writers suggest that legal procedure while it defines a form of social organization through "systematic institution of supreme authoritative standards", it is not an all or nothing concept. That is to say, while we might list universal characteristics of legal procedure, there is no firm boundary or legal form. Each legal system can be assessed in terms of whether independent conditions are present, to a greater or lesser extent, and whether collectively it meets a sufficient standard of compliance, so as to be regarded as acting in accordance with law.

Having said this, it is also evident that a legal system must adhere to minimum procedural conditions, for the most part be of general application, and set out a generally recognised way of adjudicating doubtful cases, having regard to the arguments from both sides.[36]
In practical terms, international criminal law is a manifestation of global community processes. It consists of prescribed criminal standards with extraterritorial reach, derived from treaty based expectations that carry the obligation to prosecute or extradite offenders. Whether these expectations have been generated by treaties, customs or practice they are universally accepted as prescribed criminal conduct arrived at through the processes of international agreement and consensus.[37]

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[35] original source se Lon Fuller *The Morality of Law* revised edition 1969 pp46-91; for a summary of the eights canons see Wueste D.E., 'Book Review; Fuller's Procedural Philosophy of Law' 71 *Cornell Law Review* (1986) p1205 at1213; for complete discussion of these canons see R Summers, *Lon L Fuller*, (Jurist Profiles in Legal Theory, No.4 (1984) at p28, 36 and 159.

[36] J.R. Lucas On Justice 32, (1980)

[37] Nagan W.P., Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia, 6 Duke J Comp. & Int'l L 127 at 132.

A central problem for international criminal justice however has been that the state is the most concrete agent of organized power. Our international community is made up of sovereign states, who have traditionally regulated their own affairs. Among these states, rules for regulating criminal trial have grown out of a variety of legal traditions, most notably from the common and civil law families of legal thought.

International criminal law practice has attempted to synthesise the varied state methods of trial, into an idiosyncratic amalgamation of conventional state practice. As such a common and effective international code of criminal practice and procedure has emerged out of a difficult accommodation. Whilst substantive criminal law seems intuitive and embodies a code of conduct deemed to be offensive to the common conscience of the world, - the procedural method has proved less self evident, largely evolving out of explicit innovation and proscription.

As at the time of the creation of the ad hoc International Criminal Tribunal for the Former Yugoslavia, there existed no conceptual framework for administering and enforcing internationally recognised criminal practice and procedure. In the absence of a formal framework, international norms and standards were enunciated which borrowed from treaties, customs, and national legislation. As a base line, it is fair to say that there exists conventional minimum fair trial standards and guarantees, that universally apply to all legal systems of the world notwithstanding the rich diversity of legal cultures.[38] These international standards on fair trial are embodied in collective agreements between the community of nations as a minimum criteria for assessing how governments treat people accused of crimes.[39]

So the minimum standards perhaps form the core legal values, below which, derogation might prove detrimental to, or detract from, an overall conclusion by an objective observer as to whether a trial is 'fair' or otherwise. But identified minimum standards of a fair trial are neither an exclusive nor exhaustive list of guarantees. These are base level indicators for the purpose of analysis.

The minimum standards of fairness by which the trial may be judged are numerous, and are enshrined in treaties and other non-treaty standards. [40]

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[38] Bassiouni M.C. Human Rights in the Context of Criminal Justice; Identifying International Procedural Protections And equivalent Protections in National Law' 3 *Duke J. Comp. & Int'l L*. (1993) 235 at 236

[39] Universally applicable principles recognized in the Universal Declaration of Human Rights, adopted 50 years ago by the world's governments and still the cornerstone of the international human rights system. In the years since1948, the right to fair trial recognized in the Universal Declaration of Human Rights has become legally binding on all states as part of customary international law. The right to fair trial has been reaffirmed and elaborated since 1948 in legally binding treaties such as the International Covenant on Civil and Political Rights, adopted by the United Nations (UN) General Assembly in 1966. Fair trial principles have been recognized and specified in numerous other international and regional treaties and non-treaty standards, adopted by the United Nations and by regional intergovernmental bodies.

[40] Commentary to the International Commission (ICL) Draft refers to standards of a fair trial see Articles 9, 14, 15 of the International Covenant on Civil And Political Rights (ICCPR), African Charter on Human and Peoples' Rights (African Charter) ,African Commission on Human and Peoples' Rights (African Commission) ,African Commission Resolution on the Right to Recourse Procedure and Fair Trial(African

To a certain extent the rules of evidence and procedure that were developed by the international ad hoc tribunals, as well as for the International Criminal Court have secured a degree of uniformity by establishing a statutory framework of rules that

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Commission Resolution), African Court on Human and Peoples' Rights (African Court) American Convention on Human Rights (American Convention), American Declaration of the Rights and Duties of Man (American Declaration), Basic Principles on the Independence of the Judiciary ,Basic Principles on the Role of Lawyers , Basic Principles for the Treatment of Prisoners, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Beijing Declaration and Platform for Action, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), Code of Conduct for Law Enforcement Officials, Committee against Torture Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention), Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Rights of the Child Declaration of the Rights of the Child, Declaration on the Elimination of Violence against Women, Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture), Declaration on the Protection of All Persons from Enforced Disappearance (Declaration on Disappearance), European Commission of Human Rights (European Commission), (European) Convention for the Protection of Human Rights and Fundamental Freedoms(European Convention), European Court of Human Rights (European Court), European Prison Rules, Geneva Conventions of August 12, 1949 (Geneva Conventions) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) , Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Guidelines on the Role of Prosecutors, Human Rights Committee Inter-American Commission on Human Rights (Inter-American Commission) Inter-American Court of Human Rights (Inter-American Court), Inter-American Convention on Forced Disappearance of Persons (Inter-American Convention on Disappearance), Inter-American Convention to Prevent and Punish Torture (Inter-American Convention on Torture), International Convention on the Elimination of All Forms of Racial Discrimination Convention against Racism), International Covenant on Civil and Political Rights (ICCPR) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (Protocol 6 to the European Convention), Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol 7 to the European Convention), Protocol to the American Convention on Human Rights to Abolish the Death Penalty Resolution on the Right to Recourse Procedure and Fair Trial of The African Commission on Human and Peoples' Rights (African Commission Resolution) Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Yugoslavia Rules) Rules of Procedure and Evidence, International Tribunal for Rwanda (Rwanda Rules) Safeguards guaranteeing protection of the rights of those facing the death penalty(Death Penalty Safeguards)Second Optional Protocol to the International Covenant on Civil and political Rights, aiming at the abolition of the death penalty (Second Optional Protocol to the ICCPR) Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), Statute of the International Criminal Court (ICC Statute), Statute of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Statute), Statute of the International Criminal Tribunal for Rwanda (Rwanda Statute) United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines),United Nations Rules for the Protection of Juveniles Deprived of their Liberty, United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) , Universal Declaration of Human Rights (Universal Declaration)

identify general principles of procedural law which have emerged from the world's major criminal systems. "These rules of procedure are thus an exponent of convergence or concurrency of international, regional and national judicial norms that represent contemporary standards of procedural due process"[41]

But to a large extent these articulated rules of practice are borrowed from diverse legal traditions such that the convergent mix has inherited a contradictory and conflicting set of legal principles which will only be reconciled through judicial application to the novel forum of the international criminal trial

Common and civil law Influences in International Criminal Law;

When courts apply adjectival law to individual cases, they make determinations as to procedure and evidence. This might involve finding that a specific provision is sound or unsound, oppressive or beneficial, valid or invalid, thereby shaping alternative traditions of procedural response. These responses are largely determined by '[d]eeply rooted, historically conditioned attitudes'[42] about the nature of law. These attitudes have led to the emergence of two highly influential contemporary legal traditions , primarily civil law and common law systems of organization and operation.[43]

Decisions as to the concrete rules that regulate a trial process are influenced heavily by what is believed to be the proper method for deciding legal disputes. These beliefs are largely culturally determined, such that every legal systems customise their own distinct set of legal norms to regulate conduct.[44] Outcomes of trials are determined as much by the methodology employed as the merits of the controversy. The difference in methodology prompted the famous remark from Professor Schlesinger that it would be preferable to be tried under common law procedure if guilty and under common law procedure if innocent.[45]

For some theorists the elevation of procedure in an effort to create uniform turf on which disparate cultures might meet and harmoniously co-exist, is premised upon the mistaken belief that procedure and substance are capable of being separated. For Vivian Curran the view held by Habermas ignores the 'dynamic of fusion' that exists between substance and procedure, and misrepresents the differing roles of procedure in common and civil law systems. [46]

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[41] Knoops G.G.J. *Defenses in Contemporary International Criminal Law*, Transnational Publishers, Inc. New York (2001)

[42] Merryman J.H. *The Civil Law Tradition: An Introduction to the legal systems of Western Europe and Latin America*. 2nd Edition Stanford University Press, 1985, at p 1.

[43] Other legal tradions include; Socialist law, Muslim

[44] Fernando Orrantia 'Conceptual Differences between the Civil Law System and the Common Law System', 19 *Southwestern University Law Review* (1990) p 1161 at 1162.

[45] Prof. Rudolf B Schlesinger Comparative Law. Cases Texts and Materials (3rd Ed) 1970 at p344.

[46] Curran V.G. Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union, 7 *Columbia Journal of European Law*. 63 at p. 80 For Curran any attempt to alter the 'stature of procedure' in civil law would profoundly effect the substantive civil law legal tenants.

But suppose as well as differences in procedural and evidentiary practices there ran a deeper contrast in the philosophies employed and the assumption drawn, such that the two systems in fact differed in what they expected the trail to achieve and even in their view of human nature. Damaska argues that the common law so ritualises aggression, and has become so concerned with "rules regulating the battle…[that] it seems perfectly acceptable that a party, perhaps in the right on the merits, [should] lose on a technicality.."[47] It might be argued that civil law attempts to 'ascertain the truth' while common law seeks to achieve 'fact finding precision' often erecting "evidentiary barriers to conviction"[48] Of course the reverse side of argued by common law commentators is that an excessive preoccupation with 'material truth' might give implicit approval of less than savory methods of fact finding.[49]

If there is on thing for certain it is that 'common law procedure confounds the civilist as much as civil procedure confounds the common law attorney'[50] The disparities that exist between the two traditions may not only be problematic for the practitioner, but may have potential ramifications upon the procedural fairness offered to the accused.

George Christie goes as far as to say;

> *"…courts operating in different legal cultures can reach different conclusions on the same issue not necessarily because they take different views of the merits of the issue involved, but because they have a different view of the judicial function and/or utilise different judicial techniques"*[51]

The common law, has expanded upon the notion of procedural rights and adjudicative fairness through elaborate rules of evidence, being traditionally more comfortable than the continental legal system, with the exercise of restraint over evidence. As a matter of fairness, the common law will allow only that evidence which rules of exclusion and public policy permit.

At international level the objective of legal uniformity must accommodate these two highly distinctive legal traditions. This progression has spawned " a hybrid, homogenised legal culture". But what happens when two cultures are thrown together? Is the resulting blend characterised by a breakdown in the distinctive traditions or an uneasy

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[47] Damaska M., Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' 121 *University of Pennsylvania Law Review* (1973) 506 at 581.
[48] Damaska M., Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' 121 *University of Pennsylvania Law Review* (1973) 506 at 579.
[49] Mc Clelland G., A Non Adversarial Approach to International Criminal Tribunals 26 *Suffolk Transnational Law Review*. (2002) p1 at 13.
[50] Markovits I., "Review Essay; Playing Opposites Game: On Mirjan Damaska's The Face of Justice and State Authority; A Comparative Approach to Legal Process", 41 *Stanford Law Review* (1989) p.1313 at 1314.
[51] Christie G., Some Key Jurisprudential Issues of the Twenty First Century 8 *Tulune Journal of International and Comparative Law* (2000) 217 at 224.

accommodation of irreconcilable differences? And has the fusion led to an arbitrary administration of judicial processes dependant upon the composite impact of various juridical legal traditions on the bench?.

For Vivian Curran the fusing of common and civil law traditions result in both traditions being "altered by mutual encounter [each] adapting to the imperatives of co-existence"[52] What effectively emerges is 'a common law twist on a civil law methodology'[53]

One might assume that the combining of two distinct legal traditions would have the resulting effect of doubling the safeguards against the excesses of judicial power, however it seems the opposite is true.[54] Elise Groulx, President of the International Criminal Defence Attorneys Association has even gone so far as to allege that the new dual system is 'unconsciously geared toward securing convictions'[55]

> *"At the root of the problem is the hybrid nature of war crimes tribunals. They draw from two distinct traditions; the "adversarial" system of English common law, where the prosecution and defence clash and the judge acts as a neutral referee, and the "inquisitorial" civil law tradition of continental Europe in which judges take an active role in seeking out the truth."*[56]

International criminal tribunals then, are a hybrid of both the civil law and common law system.[57]

A functional international system can not rely upon the state of emergency to justify derogation from the procedural rights of the accused. This is because the basis for referral is undermined, and the legitimacy of the finding is diminished by procedural irregularity or unfairness. A trial which derogates from procedural rights necessary for a fair trail obviate the need for an international foum.[58] In effect, we look to the international legal

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[52] Curran, V.G., "Romantic Common Law, Enlightened Civil Law; Legal Uniformity and the Homogenisation of the European Union" (2001) 7 *Colum. J. Eur.L.* 63 at 64

[53] Curran, V.G., "Romantic Common Law, Enlightened Civil Law; Legal Uniformity and the Homogenisation of the European Union" (2001) 7 *Colum. J. Eur.L.* 63 at p73

[54] Christensen R., Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepencies Between Civil and Common Legal Systems in the Formation of the International Criminal Court"., 6 *UCLA Journal of International Law and Foreign Affairs* (2002) p.391 at

[55] Elise Groulx is quoted in Asteir H., Rights of the Despised, *Prospect* Vol 11, Issue 18., see http://www.prospect.org/print/V11/18/astier-h.html

[56] Asteir H., Rights of the Despised, *Prospec*t Vol 11, Issue 18., see http://www.prospect.org/print/V11/18/astier-h.html

[57] Gallant K.S., The Role and Powers of Defence Counsel in the Rome Statute of the International Criminal Court 34 International Law (2000) 21 at 21

[58] Staplton S., Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissability of Derogation 31 *New York University Journal of International Law and Politics* (1999) p 535 at538-539.

system to both extend the rule of law and provide an amalgamation of process, to which national courts can aspire.[59]

It is true however, that no system exists in its truest form. Traditional differences are increasingly eroded as they borrow from one another. Civil law jurisdictions have learned to give more weight to precedent and common law countries enact uniform codes.[60] The experience of criminal tribunals have been to place little or no sway upon the harmony of precedent. For some practitioners of common law persuasion, the 'result is too much power entrusted to the judges.'[61]

This merger of two traditions at international level however brings unpredictability, as judges from various civil and common law backgrounds, apply their own experience of evidentiary and criminal procedure in a cocktail of legal interpretation.

At the international level, the fusion appears to superimpose the judge as 'super prosecutor' over already adversarial nature of proceedings, such that a judge can offer assistance where a prosecutor is unable to meet the requisite burden of proof.[62] This is amplified by the fact that judges deciding motions at each stage of the trial, apply and interpret rule of evidence and procedure that under the statute they have been delegated the authority to amend. Thus allowing judges to draft and approve the laws they will interpret thereby altering the traditional role of judge as legal interpreter to incorporate the task of legislator.[63]

The heightened role of the judge in the international criminal trial, theoretically should ease the excesses of the adversarial system, shifting the focus from a party controlled, to judge led proceedings. In addition, the absence of the jury, diminish the imperative for a preoccupation with filtering evidence. All things being equal, the conventional wisdoms that form the rationale for modern exclusionary approach to evidence in common law, are removed. This has led to the rules of evidence being subsequently relaxed in preference for a general 'best evidence' test.[64] The danger here is that the new model presupposes the even hand of the prosecution, and this arguably is not the reality.

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[59] Christensen R., 'Getting to Peace be Reconciling notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal systems in the Formation of the International Criminal Court' , *6 UCLA J. Int'l L. & For. Aff.* (2002) p391 at394.

[60] Helmolz R.H.,Continental Law and Common Law: Historical Strangers or Companions?, (1990) *Duke L.J.* 1207 at 1208.

[61] Johnson S.T., On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal For the Former Yugoslavia." , 10 International Legal Perspective (1998) p.111 at 119.

[62] Johnson S.T., On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal For the Former Yugoslavia." , 10 International Legal Perspective (1998) p.111 at 119.

[63] See Article 15 ICTY/ICTR Rules of Practice for the International Criminal Tribunal for the Former Yugoslavia . See Alvarez J.E., Rush to Closure: Lessons of the Tadic Judgment, 96 *Mich. L.Rev* (1998) p.2031 at 2064 note this provision was also included into the Nuremberg Statute of the Int'l Military Tribunal

[64] McClelland G.A., A Non Adversarial Approach to International Criminal Tribunals'., 26 *Suffolk Transnational Law Review* (2002) p.1 at

In the emerging international criminal procedure, the judge appears to be assuming the more active investigative role of inquisitor, whilst the Prosecutors appear to be assuming the more aggressive common law position of adversary. This has the combined effect of a 'ganging up' against the accused, and giving the impression that the state and prosecutions are combining forces to secure a conviction. A President judge will first conduct his/her own line of enquiry without intervention or opportunity to object to the bench's line of enquiry by the parties. This is because the bench controls the proceedings and will not be checked by the parties involved. This open slather approach to the taking of evidence at trial, lends heavily from the inquisition model. This judicial activist method employed by the bench, when combined with an aggressive style of prosecution, putting the case for a conviction, has the potential for earning international criminal procedure a reputation for heavy handedness. This 'doubling up' of interrogation of witnesses alters the trial balance, and to a certain degree displaces the onus from the prosecution on to the defence with drastic effect upon the presumption of innocence. This is an example where the hybrid model is taking from both systems with the effect of removing basic protections for the accused.

In terms of the admission of evidence, the international jurisdiction again attempts to awkwardly straddle the civil and common law traditions attempting to reconcile the irreconcilable. The resultant compromise is a marked departure from the controlled admission of evidence under the common law, instead relying heavily on unchecked judicial discretion.[65] In practice, the court allows the presentation of virtually any evidence, free from the concerns associated with the potential prejudicing of a jury, and proceed to conduct factual triage on the basis of probity weighed against prejudice. This open approach to evidence potentially extends procedural favouritism to the prosecution The inherent difficulty, that does not auger well with common law practitioners, however, is that it is difficult for a court to apply rules of exclusion to itself. Evidence, subsequently ruled inadmissible, may leave an impression impossible to irradicate.[66]

If the common law adopts a strict adherence to procedure and the civil law adopts a rigid approach to the application of positive law, then a hybrid system might be described as the juncture where form and substance meet, Or where precise and rigid rules of evidence give ground to the exercise of discretion to be exercised under broad legal standards. To an extent the institutions evolve out of some middle ground methodology that oscillates between expediency and experimentation. What Mark Findlay refers to as the "harmony of conveniences" rather than a genuine recognisable synthesis between two procedurally divergent styles.

The bringing together of divergent legal traditions have been described by some writers as a harmony of convenience as opposed to any real recognised institutional procedural

[65] Murphy S D., Development in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93 *Am. J. Int'l. L* (1999) p.57 at 80.
[66] Love, J.A., 'The Applicability of Rules of evidence in Non Jury Trials" (1952) 24 *Rocky Mountain Law Review* 480 at 482 cited in Australian Law Reform Commission Report 26 vol 1 *Evidence* at p 35.

synthesis. [67] Mark Findlay, suggests that the global push towards international criminal trial practice is characterised by expediency, where outcomes are achieved through a rationalised rather than a rational approach. The result is a degree of trial and error, law in the making.

It is an oversimplification to suggest that analysing the international trial process is a mere exercise in disentangling the principle competing procedural traditions, because this would make the assumption that legal traditions are static or neutral concept. Far from it, legal systems are dynamic living phenomenon which both exert influence and are susceptible to influence. In practice differences erode as the two systems borrow from each other.[68]

When we analyse international criminal procedure from the perspective of a dichotomy of influences (common and civil law systems) we must first recognise that "[d]ichotomies provide only a two dimensional slice through reality." To make this concession we thereby acknowledge that when we embark upon an analysis of civil and common law influences in international criminal law procedure, we impose conceptual abstractions commonly used by comparativists to create order, as opposed to adding meaning to our analysis.

We need to move beyond the simplistic division between codified and case law systems and begin to appreciate the blending of inquisitorial and accusatorial elements that exist at international criminal law. As these two legal families are blended their peculiar assumptions, thought processes and predilections converge or diverge[69] As the new ground is consolidated, by questioning traditional premises goals and approaches it is becoming increasingly apparent that fundamental contradictions exists, not so much between the substantive rules but between the institutions, procedures and techniques that characterise the two systems.

A possible form of approach is to analyse the efforts made towards synthesis from the perspective of the differences that are exposed. The actual differences which emerge offer a opportunity for critical evaluation.

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[67] Findlay M., International Trial Process and Access to Justice, International Criminal Law Review 2, 2002 p237 at 242.

[68] Prof. Mirjan Damaska has analysed and dissected procedural styles into their individual components in an effort to give comparative legal studies a model of 'pure' procedural styles. Procedural elements were identified according with structural affinity and internal consistencies to arrange theoretical constructs. "Damaska wants to construct procedural archetypses that will allow us to name the components of the most diverse existing procedural styles and group them into recognizable and meaningful patterns" In this way, we can identify 'cross cultural perplexities' and cross fertilization. See Markovits I., Review Essay; Playing the Opposite Game: On Mirjan Damaska's The Face of Justice and State Authority" 41 Stanford Law Review (1989) p.1313 at 1315 for original wrintings of Damaska see Damaska M., *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986). See also Damaska M., Structure of Authority and Comparative Criminal Procedure 84 Yale Law Review (1975) p. 480

[69] Merryman J.H., "On the Convergence (and Divergence) of the Common law and Civil Law", 17 Stan J. Int'l L., (1981) at 357.

More than a straightforward dichotomy of legal traditions, there exists a trend towards transferable criminal procedure such that the practice which is emerging is a new or *sui generis* entity operating above jurisdictional peculiarities and "cherry picking" and transplanting translatable principles.

There is a danger however in understating the degree of divergence that exists between the ideological underpinnings of the two legal systems. Some essential elements are either incompatible or realised differently.

In terms of the procedural guarantees to fair trial. Some jurisdictions annunciate and quantify justiciable rights which stand as an assurance against the abuse of state. Conversely, other jurisdictions accord procedural protections built into wide ranging judicial discretions. These differences are never so real as when a practitioner is confronted with the application of judicial discretion that not only discords with their own understandings of how the trial process should operate, but sits so uneasily with their own fundamental ideology that it greats with their instinct and what they have come to have accepted as intuitive.

This is true for both procedural and evidentiary problems, which demonstrate that although the international criminal law practice and procedure is giving lip service to the concept of synthesis a fair degree of dissonance remains in the practical translation and reality of the synthesis.

What this means in practice, is that jurisdictional loyalties and familiar codes of practice, are promoted through the preferences of judges and prosecutors as practitioners favour their own traditions. This can have the effect that each constituted international panel or tribunal of jurists bring their own peculiarities to bear, and compose a unique combination of influences.

To harmonise a system of justice that is recognisable and acceptable to practitioners on both sides of the methodological divide, in practice requires a pragmatic approach driven by a need to depart from a desire to exhaustively reconcile conflict that exists between the two approaches. Rather, adopt an approach loose enough not to have to "articulate every rule but put in place an acceptable framework through which rules can be enacted on the basis of need'.[70]

If we consider the foundational documents of the International Criminal Court (ie; Rome Statute, Rules if Evidence and Procedure, etc.) to be the primary model then we can expect to see procedural and evidentiary ambiguities debated in an "environment in which some of the clashes of the legal system are declaring themselves" [71]Justice Louise

[70] Dyon N., and M. Spencer "Prosecuting War Criminals: An Interview with Justice Louise Arbour of Canada Supreme Court, Peace Magazine April 2000 at p.16 (see also internet site: http://www.peacemagazine.org/004/arbour.htm (Justice Louise Arbour ; Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and Rwanda, in the Hugue, Netherlands)

[71] Dyon N., and M. Spencer "Prosecuting War Criminals: An Interview with Justice Louise Arbour of Canada Supreme Court, Peace Magazine April 2000 at p.16 (see also internet site:

Arbour the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, is of the opinion that the "lack of coherence" in the ICC documents will be resolved "through interaction of progressive judges who will make decisions as they go along" This approach however may not auger well with civilly trained judges who would resist the heavy reliance upon judicial foresight and interpretation.

Much of these identified tensions, were played out in lively debates between delegates before the Preparatory Committee[72] , formed to draft *Rules of Procedure and Evidence* together with draft *Elements of Crimes*, prior to the establishment of the International Criminal Court.

By way of example; the delegate lawyers from common law backgrounds insisted upon detailing the element of crimes with specificity, while the civil lawyers adopted the position that if there was any doubt as to the need for an element, it ought to be left out so as to avoid risk that by being too specific, that they might prevent a prosecution.[73] While the omission of specific elements might be tolerable for a state that does not use elements of a crime to formulate judicial pronouncement, it would be an inconceivable approach for a state which adheres strictly to precisely articulated criminal elements of proof. The draft presented as the final document was a compromise between the preference for ambiguity (so as to keep agreement loose enough to induce 120 countries to sign) and the opposing need to present a tight set of criminal elements for adoption. The bridge, between substantially different positions, was gapped through the skilful employment of nuanced terms.[74]

This is the very heart of the tension of the modern synthesis – Judges are left to preside over novel and untested procedural and evidentiary rules, the elucidation and construction of which "divides the very judges charged with their interpretation".[75]

So there are two possible approaches; either persist with the synthesis approach with it inherent conflicts or galvanise around a new trial theory.

Synethsis

The problem with the synthesis approach is that is makes the assumption that different legal traditions have common core objectives but have evolved and adapted different methodologies to achieve the same ends In practice, this approach has two dangers. First,

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http://www.peacemagazine.org/004/arbour.htm (Justice Louise Arbour ; Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia and Rwanda, in the Hague, Netherlands)

[72] The Prepartatory Committee was set up as the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome Italy (15 June –17 July) 1998. Paragraph 5 and 6 of resolution F of the Final Act required the PrepCom to draft Rules of Procedure and Evidence and Elements of Crimes before June 30, 2002. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. GAOR, 53d Sess., Annex 1, Res.F, Para 5-6, U.N. Doc. A/CONF. 183/10 (1998).

[73] Lietzau, W.K., Symposium Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court 32 *Cornell Int'l L.J*. 477 at p.487

[74] Lietzau, W.K., Symposium Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court 32 Cornell Int'l L.J. 477 at p.487

[75] Christensen R., 6 *UCLA Journal of International Law and Foreign Affairs* 391 (2002)

it appeals to the 'common denominator' and is both imprecise and virtually all inclusive, establishing no boundaries save a few basic prohibitions and is elastic enough to encompass a wide range of judicial discretion.

Secondly this approach makes the assumption that the two major legal traditions of the world attempt to achieve the same ends. Comparative Law academics are not certain they do. [76] Findlay maintains however that in order for there to be synthesis at the level of ideology international procedural practice needs to move beyond giving lip service to 'speaking with one language' and genuinely challenging principles rather than simply tolerating contradiction.[77]

Synthesis will ultimately mean compromise between procedural differences. The result will inevitably be a fair trial formula, and an internationalised trial procedure which merges and elaborates upon competing styles.

The danger is that the traditional protections guaranteed by both systems are uncertain in the international criminal arena. Judges are neither bound by common law precedent to take incremental steps, nor required to strictly adhere to legislative prescription, but can appropriate elements to combine and form a new legal systems in an unpredictable fashion. The result of combination, might closer estimate a 'lowest common denominator'[78] of rights which aims to not fall below those guarantees articulated in international human rights documents rather than aspire to a high standard of procedural fairness. That is to say the bar is set too low.[79]

A New Trial Theory

A new trial theory will require practitioner in the international criminal law jurisdiction, to abandon everything they know, become much more philosophical about their role in the process, and hope that somewhere between the truth seeking judge-led inquisitorial model and the procedural- truth adversarial/conflict model lies a unique amalgam of common and civil law features, An indigenous system arrived at through interplay and compromise, where typology becomes cumbersome.

If we are to assemble from the multitude of influences a meaningful sense of fair trial procedure then there needs to be a shared view of what we are doing? and why? - A common intellectual ground where practitioners of all influences can meet. Some

[76] "In both styles there prevails some confusion about rights protection; where do the victims and the accused person stand relative to each other and the interests of the State?" see Findlay M., Synthesis in Trial Procedures? The Experience of International Criminal Tribunals', *International and Comparative Law Quarterly* (2001)p.1 at 12

[77] Findlay M., 'Synthesis in Trial Procedures? The Experience of International Criminal Tribunals' *International and Comparative Law Quarterly* (2001)p.1 at 11

[78] Christensen, R Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court", 6 *UCLA Journal for International Law & Foreign Affairs* 391 at417

[79] Johnston, S.T., "On the Road to Disaster: The Rights of the Accused in the International Criminal Tribunal For the Former Yugoslavia", 10 *Int'l Legal Persp*. (1998) 111 at 120.

rudimentary 'minimal internal coherence' or what Procedural Natural Law theorists might call the internal morality of the international legal system.

Once we establish the underlying objectives for what we are doing, and the rationale behind it, then we can look at each adjectival rule and establish whether it serves this purpose. A common trial theory will draw together, in real synthesis, the key standards and underlying objectives of the international criminal trial.

If we adopt the Procedural Natural Law theory position, then the rationale behind implementing adjectival rules upon a fact-finding court, is to ensure that similar cases are treated similarly, and that the individual is guarded against the excesses of internationally sanctioned power. In the context of an international system, practitioners and judges alike would examine each specific rule of evidence and procedure as characteristically sound or unsound, oppressive or beneficial, valid or invalid, in accordance with whether it serves the agreed underlying objectives. Conventionality then would become the guiding mechanism for determining which commonplace practices, that form the stock of rules governing international criminal tribunals, promote a system which discharges its moral requirement of treating its defendants equally, and in a manner which is objectively and impartially fair.

In deed the instruments that govern international trial institutions, will themselves significantly influence the trial process, as they forge a new blend of international practice, regardless of professional preference.[80] These rules of practice will generate the 'atmosphere of compromise and pragmatism'.[81] This is however all well and good, except where the text of the instrument is silent.

Inevitably the impact of prescribed procedural regulations, will be tailored to suit conditions -most notably the institutional context in which justice is administered. As rules are imported and combined in a novel context the 'evidentiary transplants' assume an unpredictable element in living law.[82] Although it is still early days, and international criminal law procedure is still in its formative phase, we can nevertheless begin to see areas that will need attention.

From initial observations, we see that the roles of judge and prosecutor in emerging international criminal procedure, is tending towards judicial discretion, as a more

[80] As a defence practitioner before the Special Panel for Serious Crimes in East Timor, upon registering objections relating to trial procedure by citing common law practice, I was frequently reminded by the Panel that the relevant authority for trial procedure was the RULES OF CRIMINAL PROCEDURE, UNTAET Regulations 2000/30. Without being able to direct the court to a regulatory provision for support of my procedural point of order, my submission ultimately failed. Suggesting a strong adherence to the governing instrument as the relevant and overriding authority for practice.

[81] Findlay M., Synthesis in Trial Procedures? The Experience of International Criminal Tribunals', International and Comparative Law Quarterly (2001)p.1 at 13

[82] Professor Mirjan Damaska 'The Uncertain Fate of Evidentiary Transplants; Anglo-American and Continental Experiments', 45 American Journal of Comparative Law (1997) 839

important factor than it is in either of the traditional procedural styles.[83] However a move towards a strong civil law notion of judicial activism, together with a partisan common law style prosecutor - have the combined effect of weighting the trial procedure in favour of the state. In the context of an international political imperative for trial outcomes, there is an enhanced likelihood that procedural fairness gives ground to expediency.

It is important that both Civil law and Common law Prosecutors, Defence Counsel and Judges , develop the capacity to look beyond their own legal systems and school themselves in a new discipline. This is not easy, given that the fundamentals of common law and civil law mentalities are all pervasive and instinctive, and whilst lawyers are trained in one discipline they 'understand both but proceed to unlearn one'[84]

It is even more imperative that the discipline of international law, arrive at a consistent methodology, and develop an articulate and coherent set of procedural rules which are universal and translatable. A standard trial practice is still yet to emerge, and while this is the case - justice for the accused seems poorly ensured and ambiguously defined.

The leap from the common law to civil law is not small. What will be the consequences? Will it result in the relative dominion of one culture over the other? Or will it result in equal component parts? Or a sui generis procedural system? And importantly will the resultant legal blend offer a system of fair trial to the accused?

For Montesquieu, "Perhaps the greatest genius may reside in knowing which circumstances call for uniformity and which for difference"[85] Still greater genius may be required to accommodate the goals of uniformity and difference simultaneously… or acknowledge that that they are not amenable to simultaneous accommodation'.

Fair Trial Procedures at Nuremberg;

On August 8, 1945 the Allies signed the *London Agreement*[86] establishing the International Military Tribunal with a jurisdiction that was not limited to geographical location. *The Charter of the International Military Tribunal* (which was attached to the London Agreement) provided for one judge from each of the for allied powers to preside over and to "*try and punish persons who, acting in the interests of the European Axis countries, whether as an individual, or acting as a member of organizations, committed any of the crimes defined in the Charter".*[87]

[83] Findlay M., Synthesis in Trial Procedures? The Experience of International Criminal Tribunals', International and Comparative Law Quarterly (2001)p.1 at 13

[84] Vivian Grosswald Curran, "Romantic Common Law, Enlightened Civil Law; Legal Uniformity and the Homogenisation of the European Union" (2001) 7 Colum. J. Eur.L. 63 at 70

[85] Montesquieu p126 footnoot 311????

[86] U.S *Executive Agreement Series* No.472

[87] *The Charter of the International Military Tribunal*

In the same period, a similar military tribunal was conducted in Tokyo where Japanese leading war crimes cases dealing specifically with command responsibility such as Yamashita[88] and Toyoda[89] These trials in Nuremberg and Tokyo have had both 'champions and critics'[90] But whatever the viewpoint, it can not be denied that these trial manifested the practicability of bringing individual war criminals to trial and set out the criminal liability of individuals acting in the name of the state, or under official order (military or otherwise).

Importantly, these trials argued the legitimacy and jurisdictional arguments for convening such trials and established important precedents with regard to the definition of crimes over which the jurisdiction of the tribunal extended. In addition, these trials set up the beginnings of an international enforcement mechanism that was to add sanctions to the numerous international agreements.

It was an internationally recognised principle that a group of states exercising criminal jurisdiction over aliens shall not "deny justice"[91] For an examination of this principle the six to two decision of the Supreme Court of the united States which upheld the decision of General Mac Arthur in the trial of General Yamashita is instructive. In a dissenting judgment Justice Murphy asserted that;

> *The fifth amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. In deed such an exception would be contrary to the whole philosophy of human rights which make the constitution the great living document that it is. The immutable rights of the individual including those secured by the due process clause of the fifth amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or belief. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.*[92]

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[88] Yamashita Trial 4 LRTWC 1 The Yamashita Case involving the trial of a Japanese general for atrocities committed in the Philippines, is probably the best known military command case. The application of the doctrine however is controversial, because it applied a strict liability test to liability. On the other hand the trial of Admiral Toyoda, which resulted in an acquittal the tribunal took pain staking care to summarize the essential elements of command responsibility.

[89] Toyoda Trial see secondary source W.H. Parks Command Responsibility for War Crimes, (1973) 62 Mil.Law Rev. p.1

[90] See Wright, Q.The Law of the Nuremberg Trial 41 AJIL (1947)p38 at p.42

[91] Wright Q., Due Process and International Law, Vol 40 AJIL (1946) p398.

[92] In re Yamashita 1946, 66 Sup Ct 340 at p 432

The Chief Justice, however speaking for the majority of the court, declined to apply the domestic interpretation of the principle of due process to a tribunal established by international law. Instead it held that questions of competence and procedure are determined by international law and the military commanding officer.[93] Despite the majority decision, the dissenting justices were at pains to uphold constitutional protections. Justice Rutledge gave recognition to the fact that the decision in Yamashita was 'wholly untrodden ground' and went on to articulate the core content of due process principles as; the ability to test the evidence and the opportunity to offer a defence. He held ;

> *… that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the result of the prosecution's ex parte investigations, but shall stand on proven fact, the other, correlative, lies in a fair chance to defend.*

Judge Rutledge went on to be more specific. He stated that;

> *This embraces at the least the right to know with reasonable clarity in advance of the trial the exact nature of the offence with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so; as also in the trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have reasonable time for meeting the unexpected shift.*

It is unclear where justice Rutledge derived the essence of due process, but he perhaps would have been on firmer ground if he were to have synthesised the standards found in Article 38 of the Statute of the International Court of Justice, together with international conventions, customs, general principles, and judicial decisions of the time, thereby utilising sources of law in an effort to discover standards by which to determine the denial of justice.

In October 1946 the verdict in the trial of Goering et al was pronounced, it was to herald a significant development in international law and the birth of international tribunals. It was to become the 'trial template for the prosecution and defence of war crimes'.[94] This trial and the subsequent eight trial processes that followed, came to be known as the 'great process' and staked out the high moral ground with the sweeping boast that international relations would be refashioned, where 'right' would substitute 'might'.[95]

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[93] Wright Q., Due Process and International Law, Vol 40 AJIL (1946) p398.
[94] Turley, J., Symposium on Trials of the Century. Transformative justice and the Ethos of Nuremberg", 33 Loyola of Los Angeles Law Review. 655 at 669.
[95] Laternser, H. Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders" Vol.8 Whittier Law Review [1986] 557 at p.558.

Rhetoric aside, the jurist is concerned with a strict standard of law. A process that attempts to right a moral wrong, which violates fundamental principles of law, fails to meet what the procedural natural law theorists refer to as the internal morality of the law, ie; the requirement to be procedurally fair. As articulated be Telford Taylor;

> *It is of the first importance that the task of planning and developing permanent judicial machinery for the interpretation and application of international penal law be tackled immediately and effectively. The war crimes trials, at least in Western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is generally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions.*[96]

It is a generally held consensus, that the Nuremberg Charter and the subsequent Rules of Procedure and Evidence, were a compromise blending of elements from the continental European system and the Anglo-American adversarial system,[97] where the Allied powers;

> *"all agreed in principle that no country reasonably could insist that an international trial should be conducted under its old system and that we must borrow from all and devise an amalgamated procedure that would be workable, expeditious and fair."*[98]

The Americans strongly favoured a summary procedure[99] that would bar defendants from employing Anglo-American technical evidentiary and procedural rules.[100] In his interim

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[96] Taylor, T, An Outline of the Research and Publication Possibilities of the War Crimes Trials, 9 *La.L.Rev.* (1948-49), p496 at 507.

[97] While the rules do blend aspects of both practices, they draw a significant influence from the American practice in military commissions. For a comprehensive discussion of the evidentiary and procedural rights accorded in military commissions see the trial of Nazi sabateurs in the case of; *Ex parte Quirin*, (1942) 317 U.S. 1,46. See also; Wallach. E.J., "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did they Provide An Outline for International Legal Procedure? 37 *Colum.J.Transnat'l Law* (1999) p851. See also; Sheldon Glueck, "By What Tribunal Shall War Offenders Be Tried?", 24 *Neb. Law Review*, (1945) 143. Also; Seymour Lauer, the International War Criminal Trials in the Common-law War", 20 *St John's L.Rev.(*1945)p. 18. N.K. Katyal and L.H. Tribe, "Waging War, Decding Guilt: Trying the Military Tribunal" 111 *Yale L.J.*, (2002) 1259.

[98] Jackson , Robert H., 'Nuremberg in Retrospect' 27 *Canadian Bar Review* (1949) p. 761, at page 766.

[99] The Americans had already been working on a design of procedure for military trials. In particular the Quirin Commission which was a military commission established by President Roosevelt to try Nazi saboteurs. Pursuant to an order from President Roosevelt "The commission shall have power to, as all occasions requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War , as it shall deem necessary for a full and fair trial of the matters before it. The such evidence shall be admitted as would, in the opinion of the president of the Commission, the probative value to a reasonable man." See Memorandum of the Chief, Office of the Chief of Staff WDGS from Brigadier General T.H.Green, (Acting) Judge Advocate General (October 1, 1943). Recommendations made at the direction of the Secretary of the War for guidance in discussion involving the trial of War Criminals by military Tribunals. At National Archives, Record of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31 Shelf 1+, Box 1853, File 12 [refer to as the Green Memorandum]. This is believed to be the first reference to the hand of evidence in the trial of War criminals – See; Piccigallo P., *The Japanese on Trial* (1979). The 'essential terms' as per the internal memorandum discussing the US military commissions - were to form the foundation of the rules of

report which was to prove influential[101], the Chief United States Prosecutor expressed the view that the legal rules used should remain "relatively simple and non technical" so that "the procedure of these hearings may properly bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials"[102]

The London Charter simply stated that;

> *"the Tribunal shall not be bound by technical rules of evidence. It shall adopt an apply to the greatest possible extent expeditious and non technical procedure and shall admit any evidence which it deems to have probative value"*[103]

At Nuremberg however, the there were significant departures from core legal values. This concession was made by the Chief Prosecutor Jackson as inevitable, given the novel nature of the proceedings. He stated in his report to the Conference on Military Trials that "…many mistakes have been made, an many inadequacies must be confessed" but he maintained that "..error and missteps may also be instructive for the future".[104]

Nuremberg forged unprecedented international trial practice, navigating issues that arose in the establishment of rules of evidence and procedure in a unique legal forum.[105] Mr Justice Jackson in his opening address stated that;

> *It is true of course, that there is no legal precedent for the Charter. But international law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origins in some single act, ... International law is not capable of development by the normal process of legislation. International law grows, as did the common law, through decisions reached from time to time, in adopting settled principles to new situations.*[106]

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evidence in procedure at Nuremberg and Tokyo see Wallach. E.J., "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did they Provide An Outline for International Legal Procedure? 37 *Colum.J.Transnat'l Law* (1999) p851 at p 859.

[100] Wallach. E.J., "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did they Provide An Outline for International Legal Procedure? 37 *Colum.J.Transnat'l Law* (1999) p851 at p parts is856.

[101] See Gault, PF., Prosecution of War Criminals, 36 *J of Crim. L. & Criminology* (1946), 180 at 183.

[102] Justice Jackson's report to the President on atrocities and war crimes, (June 7, 1945), IV. http://metalab.unc.edu/pha/policy/1945/450607.htm

[103] London agreement, August 8, 1945 at; http://www.yale.edu/lawweb/avalon/itm/proc/imtchart.htm. Also annexed to the London Agreement, was the Charter of the International Military Tribunal, August 8, 1945, at http://www. yale.edu/lawweb/Avalon/imt/proc/imtconst.htm

[104] Robert Jackson, Report to the President by Mr Robert Jackson, October 7, 1946 in Report of R.H. Jackson, United States Representative to the International Conference on Military Trials 432 at 440 (US Dept of State, 1945)

[105] Bush J.A. Nuremberg the Modern Law of War and its limitations" Colum. J. Transnat'l L(1993) 2022 at2035

[106] Jackson, Mr. Justice (opening address) Nuremberg Trial I.M.T. vol. II p.147

The unprecedented and retrospective nature of law implemented at Nuremberg was a central theme raised by defence. However, the prevailing argument of the day was that if express rules were declaratory of the existing law, then the jurisprudence in each individual case, in default of any specific provision, applied the corollaries of general principles. Lord Wright postulates that, even if he were wrong in his view that "positive law announcing the crime and defining criminality was in existence at all times material, at least the criminality of wholesale murder, and the like, was apparent and all that was lacking was some precise enunciation of positive law and punishment"

This notwithstanding, the inescapable political context of the Nuremberg and Tokyo trials, are an additional factor in the timing, and the imperative, for the proliferation of the laws of nations. It was evident, that while "[e]very recognition of custom as evidence of law must have a beginning sometime" , there seemed 'no more justifiable stage in history', as at the end of the Second World War, to –"recognise that by the common consent of civilised nations as expressed in numerous solemn agreements and public pronouncements the instituting, or waging, of aggressive war is an international crime".[107]

The enforcement Anglo-American criminal procedure was not only unfamiliar to German lawyers but disadvantaged the preparation of a defence . Having requisitioned, confiscated and quarantined extensive evidence against the Nazi Regime and the defendants, there existed no requirement for prosecution to explore exonerating or exculpatory matters. Neither was there an obligation to provide access to, or disclose of, any archived material to defence.

Insisting that it could not serve two masters, the Prosecuting authority presented only that evidence which supported their own thesis in the context of a court room, where the rules of procedure favoured an 'accelerated treatment'[108] of points by the Prosecution.[109]

Problematic areas at Nuremberg included, a denial of the defendant's right to confront witnesses through the use of ex parte affidavits,[110] the permission of hearsay evidence,[111]

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[107] Glueck, Prof., The Nuremberg Trial and Aggressive War 59 Harvard Law Review (1946), p396 at p 418. Note in order to test his thesis, Professor Glueck traced a number of crimes which had been recognized as such, without a statutory basis. He developed a number of examples where crimes originated by way of usage.

[108] Article 18; The court shall;

a) *confine the process strictly to the accelerated treatment of the points made by the prosecution,*
b) *take strict measures to avoid any action that could cause an unnecessary delay and to turn down any irrelevant questions and explanations of any kind'*
c) *punish unseemly conduct by imposing suitable penalties, including the exclusion of the defendant or his defence attorney from any or all of the further process actions*

[109] Note; Article 18(c) was used in the trial of Krupp et al to temporarily arrest defence counsel on the grounds that their absence from a session was viewed as contempt of court.

[110] See May R., and Weirda M., "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha, 37 Colum. J. Transnat'l L., (1999) 725 at p. 731

[111] Hearsay has continued to be allowed in subsequent international criminal tribunals see Defence Motion on Hearsay Prosecutor v Tadic Case No. IT-94-1 Aug 5, 1996 and the response Opinion and Judgement Prosecutor and Tadic Case No IT 94-1 May 7, 1997.

the denial of judicial appeal rights, and accountability for ex post facto laws .[112] '[S]ome of the Rules of Procedure were intrinsically unfair or at least incomplete' most particularly the absence of a detailed procedure for discovery, the absence of provision for exculpatory material, and the absence of a presumption of innocence.[113]

In terms of a fair trial, it would be accurate to say that the Nuremberg and Tokyo trials did not meet with the contemporary international law standard of fairness. This said, it must be remembered that at the time, international human rights law was neither formalised or developed. It is also salient to recognised that several defendants at Nuremberg were acquitted, demonstrating that at some level these proceedings were not simply a geared to convict.[114]

By the very nature of these trials, that attempted to try defendants on mass, in common trials, in categories grouped by 'time date and content of their alleged crimes', they were always going to be a less than satisfactory undertaking. The unjust individual outcomes for the defendants were amplified by unstructured and un-standardised rules, with loose operative provisions, such that it is doubtful whether minimum requirements were always met.

Judge Hu Anderson case of Krupp Case set out seven norms of general application for criminal procedure,[115] but the in the context of both the Nuremberg and Tokyo Tribunals there was much lip service paid to the principle of a fair trial but in practice less time devoted to disputes over procedure and admissibility of evidence than would be so consumed in a domestic criminal trial of comparable magnitude.

General MacArthur in response to the criticisms of dissenting judges in the Tokyo trials stated;

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[112] Kobrick E.S. "The Ex Post Facto Prohibition and the exercise of universal jurisdiction over International Crimes 87 Colum. L.R. (1987)1515, at p. 1533

[113] Zappala, S., 'Rigts of the Accused', in; A. Cassese, P Greta, and J.R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court; A Commentary*, Vol II, Oxford Uni Press., at p. 1324.

[114] Zappala, S., 'Rights of the Accused', in; A. Cassese, P Greta, and J.R.W.D. Jones (eds) *The Rome Statute of the International Criminal Court; A Commentary*, Vol II, Oxford Uni Press., at p. 1324

[115] See The Krupp case (opinion of Judge Hu Anderson)

> *"The first is that this tribunal was created to administer the law. It is not a manifestation of the political power of the victorious belligerents which is quite a different thing. The second is that the fact that the defendants are alien enemies is to be resolutely kept out of mind. The third is that considerations of policy are not to influence a disposition of the questions presented. Of these there are but two: (a) what was the law at the time and question and, (b) does the evidence show prima facie that the defendants or any of them violated it? The fourth is that the defendants are presumed to be innocent… It is true that the procedural ordnance.. provides that the Tribunals "shall adopt and apply to the greatest possible extent… non-technical procedure". But neither members of a tribunal nor the people of the nation prosecuting this case regard the presumption of innocence as nothing more than a technical procedure…. the sixth of is that it is a fundamental principle of criminal justice that criminal statutes are to be interpreted restrictively; the criminal responsibility is an individual matter; that criminal guilt must be personal. The seventh of is that the application of ex post facto laws in criminal cases constitutes a denial of justice under international law…"*

> *Those who oppose such an honest method can only be a minority, who either advocate arbitrariness of process above factual realism or who inherently shrink from the stern rigidity of capital punishment… no sophistry can confine justice to any form. It is a quality. Its purity lies in its purpose, not in its detail. The rules of war, and military law resulting as an essential corollary therefrom, have always proved subsequently flexible to accomplish justice within the strict limits of morality.*[116]

But the lessons of the trials of major war criminals after World War II was that the benevolence and good will of the Allies was not, on its own, enough. Only a scrupulous and unwavering adherence to the highest standard of criminal procedure as the overriding intention, would guard these Tribunals from erroneous findings, and allow a retort to the accusation of 'victors justice'.

As Sir Hersh Lauterpacht put it;

> *It is incumbent upon the victorious belligerent intent upon the maintenance and the restoration of international law, to make it abundantly clear by his actions that his claim to inflict punishment on war criminal is in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the victor resolved to apply retroactively to the defeated enemy the rigors of a newly created rule.*[117]

Development of rules of evidence and procedure in Ad Hoc Tribunals;

For half a century the International Military Tribunal sitting at Nuremberg and the International Military Tribunal for the Far East sitting in Tokyo were landmark entities and, with the exception of the national prosecutions of World War II cases, remained the major instances of prosecutions for offences against the norms of International Humanitarian Law.[118] Notwithstanding their shortcomings, with the passage of time these trials acquired both legitimacy and precedential value. "Time and the unfulfilled quest for international criminal justice have put a favourable gloss on the infirmities and flaws of these proceedings."[119]

It was not until more recently, with the atrocities in the Former Yugoslavia and later in Rwanda, that world sentiment crystalised around the international enforcement of international crimes, and the Nuremberg principles were legitimised and formally

[116] General Douglas MacArthur New York Times, March 31, 1946, page 16 Colum 4. Cited in Daley, "The Yamashita Case and the Martial Courts" *21 Conn. B. J.*, (1947) p136

[117] Lauterpacht, H., The Law of Nations and the Punishment of War Crimes, 21 Brit. Y. B. Int'l L. (1944) p58 at p80.

[118] Meron T., 'International Criminalisation of Internal Atrocities' 89 American Journal of International Law (1995) p554 at …

[119] Bassiouni, M Cherif "Conference Paper; Establishing an International Criminal Court" 149 Military Law Review, p49 at..

adopted. The Statutes of these tribunals (hereafter ICTY Statute and ICTR Statute respectively), and their respective *Rules of Evidence and Procedure* promulgated by both Tribunals (hereafter ICTY Rules and ICTR Rules) are important international standards At a practical level, there has been an expansion in the detail and complexity of prescriptive rules that govern the operation of international trials.

At a theoretical level there is the difficulty of merging the doctrines of public international law with those of criminal law to create a coherent jurisdiction that reflects the values of both branches of law. [120] Then there is the amalgamation of two distinct criminal traditions, civil and common law and the reconciling of disparate philosophical underpinnings.[121]

The amplification of both legal complexity and theoretical conflict, have left experts waiting to see what judicial interpretation and practice would make of the new procedural code.

The Tribunals' *Rules of Procedure and Evidence* bring together a set of provisions, from a variety of legal system. Some have described the internationalised Tribunals as " rogue courts" that" dip[s] into a *pot pourri* of different legal systems from around the world".[122]

Whilst evolving international criminal procedure has variably drawn from legal traditions, the new or *sui generis* approach to criminal procedure might be said to lie somewhere between the two major families of law. Some academics have described the mix in terms of a 'laboratory' were different cultures and procedural methods are merged.[123]

The combination of legal traditions however presupposes that the legal families from which provisions are drawn are both compatible and can accommodate one another's distinct theoretical underpinnings. This however, is not simply a matter of mixing two different legal systems into one seamless synthesis, but rather to understand the tensions that exists, and draw together the emergent criminal procedure, under a common theory of the trial.

Although the blending of two systems, opens the way for inconsistency at the systematic level - a common denominator for any process is 'fairness'. The degree to which the rules of international criminal law and procedure have respected the International Human

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[120] Arbour L., 'Progress and Challenges in International Criminal Justice'21 *Fordham International Law Journal* (1997), p. 531 at p. 531

[121] Jorg N., et al., Are Inquisitorial and Adversarial Systems Converging? in; *Criminal Justice in Europe: A Comparative Study* Phil Fennel et al eds. (1995) p41 at 41 Jorg argues that the civil law and common law systems "are the embodiment of such divergent norms and values in the field of criminal justice, in their turn reflecting profound societal values, that they can never be brought together entirely"

[122] The Times, 17 June 1999 " Anomalies of the international criminal Tribunal are Legion"

[123] Caianiello M., and G Illuminati, 'From the International Criminal Tribunal for the former Yugoslavia to the International Criminal Court' 26 North Carolina Journal of International law & Commercial Regulation (2001) 407 at p. 409.

Rights standards set out in International Covenants in Civil and Political Rights as they relate to the rights of the accused person, is of particular here.

The Statute for the ICTY is the constitutive instrument, and was adopted by the Security Council in May of 1993[124]. Pursuant to this Statute, the appointed judges have the authority and responsibility to adopt *Rules of Procedure and Evidence* to govern proceedings. The Rules of Procedure and Evidence (hereafter ICTY Rules) were duly adopted in February 1994.

From the outset these Rules were an ambitious attempt to create a full set of international rules for the conduct of pre-trial, trial and appeal procedures combining " the procedural traditions of the major systems of Law prevalent in developed nations…[125]." These *Rules of Procedure and Evidence* as adopted by the International Criminal Tribunal for the Former Yugoslavia and Rwanda, have been a 'work in progress'. Since their adoption the rules have been amended several times;

> *"…in the light of new problems…or unanticipated situations…the rules have been amended for a variety of reasons; to enhance the rights of the accused; to help better protect victims and witnesses; to take account of the views of the host country; to improve the consistency, clarity and comprehensiveness of the rules."*[126]

Since the Tribunal is an international institution, it is required to respect the international human rights standards as per the International Covenant on Civil and Political Rights (ICCPR) as they relate to the rights of the accused. Indeed the report of the United Nations' Secretary-General, that was submitted to the Security Council, and appended to the statute setting up the tribunal explicitly states that

> *"It is axiomatic that the international tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights."*[127]

Provisions contained in Article 14 of the ICCPR are reproduced in Article 21 of the Tribunal Statute. Notwithstanding that minimum provisions are provided for in the text, in practice, there are inherent difficulties in attempting to combine civil and common law

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[124] Violations of International Humanitarian Law committed in the Former Yugoslavia since 1991 (adopted 25 May 1993), reprinted in International Tribunal for the prosecution of persons responsible for serious violations of International Humanitarian Law Committed in the former Yugoslavia since 1991, basic documents, sales No. E/F/.95.III.P.1.

[125] King F.P. and A. La Rosa, 'International Criminal Tribunal for the Former Yugoslavia, Current Survey Introduction: The Jurisprudence of the Yugoslavia Tribunal 1994 to 1996.' *The European Journal of International Law* Volume 18 No. 1.

[126] ???

[127] Report of the United Nations' Secretary-General, submitted to the Security Council 3 May 1993, pursuant to operative paragraph 2 of Security Council Resolution 808, (s/25704, 3 May 1993).

rules into an international body of procedural and substantive Criminal Law, and at the same time adhering to and developing International Human Rights Standards.

Article 21 of the Statute enshrines the '*rights of the accused'*. Such principles as equality before the law, a fair and public hearing, and the presumption of innocence are preserved. Paragraph 4 sets out the various 'minimum guarantees' one more enjoyed by the accused including; 4 (a) the right to be informed of the charges against him in a language he understands, 4(b) the right to adequate time to prepare a defence, 4(c) the right to a speedy trial, 4(d) the right to be tied in his presence by a more legal representative of the accused's own choosing, 4(e) the right to examine or have examined and the right to call witnesses on his behalf, 4(f) the right to an interpreter and 4(g) the right against self-incrimination.

It is left open, as to what might constitutes the full extent of rights extended. In a code-based civil law systems, legislature define the substantive and procedural law and the powers of the civilest judge are defined by the parameters of the code. It is anticipated however, that the rights of the accused, as articulated in the Tribunal's Statute and Rules, are neither exhaustive nor aspirational, but rather present a baseline, below which the court may not descend.

We can gleaned some insight into the rationale behind the drafting of the rules from the commentary of the tribunal's first president Judge Antonio Cassese who admitted that the judges had to 'sail into uncharted waters' in order 'to create new procedures or set out our own definition of procedural concepts'.[128]

Indeed understanding domestic Criminal Law theory is a prerequisite to understanding both the point of departure, as well as, getting a new sense of the space created by the new international criminal theory. By examining the extent the new roles of the parties, reflect the roles in the civil and common law systems, we are able to describe and delineate the scope of powers exercisable by the new international criminal tribunals.

> *"This exercise is important because a fair and efficient criminal trial pre-supposes that the rules of the different actors are clearly identified".*[129]

By clarifying the scope of judicial powers, and the role of adversaries in the new trial process, we are better versed at understanding the new standard of justice to be applied in international criminal tribunals.

Graham Blewitt, The chief Prosecutor to the ICTY makes the bold claim;

> *The tribunal has achieved remarkable results, although they are far from perfect… Yet, despite their imperfections… they have demonstrated that it is*

[128] Address of Antonio Cassese, President of International Criminal Tribunal for the former Yugoslavia, to the General Assembly of United Nations, (14 November 1994).
[129] Cassel, D.W., "The Independence of the Judiciary Synthesis Report", (1992) 63 Revue International deDroit Penale, pp873.

possible to create, an international level, a fully functioning criminal justice system, and they have confirmed it, effecting arrests of indicted accused, holding fair trials, and dispensing a satisfactory standard of justice which is open to public scrutiny."

There is insufficient time today to scrutinize the criminal process implemented, and the procedural code adopted in tribunal proceedings, however , what we can say, is that the discipline of international criminal law has come a long way, and for their part the international Ad Hoc Tribunals represent a significant advance in international trial process. In deed the adherence to international human rights standards is one of the appreciable differences between the manner in which the post war trials were conducted and the more recent international criminal Tribunals –

Another significant difference is the effect of post Second World War developments in international human rights law. The proceedings of the Nuremberg and Tokyo Tribunals were far more summary than would be consistent with modern international human rights law. The present corpus of human rights law, with its emphasis on the rights of the accused, resulting in a more time-consuming, but fairer, process than existed during the Nuremberg and Tokyo trials. [130]

Indeed the Tribunal Statute and Rules not only incorporate to the text these human rights requirements, but the Trial Chambers has also adjudicated upon the application of human rights instruments.[131]

In the course of the trial, the Tribunal is frequently called upon to adjudicate upon submissions that require examination of the ICCPR and the three regional human rights instruments - the European Convention, the American Convention and the African Charter.[132]

In addition the ad hoc Tribunal's ability to try cases more efficiently[133] over time and develop its jurisprudence towards a 'corpus of substantive and procedural judicial decisions that will affect not only the ICTY own future work and that of its companion tribunal (the International Criminal Tribunal for Rwanda), but also the work of permanent International Criminal Court and also that of national courts and Tribunal, when deciding cases in this area.', is a very real achievement.[134]

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[130] Robinson P. L., 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', *European Journal of International Law*, volume 11, (2000) 569

[131] Dixon, 7 Transnational Journal of Contemporary Problems (1997) 82 at page 83

[132] Robinson P. L., 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', *European Journal of International Law*, volume 11, (2000) 569.

[133] The presentation of evidence in the *Tadic* trial lasted seven months(May -- November 1996), during which the prosecution and defence called 116 witnesses and presented 386 exhibits in their initial presentations and called 10 witnesses in rebuttal. The English transcript of the trial runs to more than 7000 pages.

[134] Murphy S. D. Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia. 93 AJIL 57 at p.62

However an overly simplistic yard stick of success in achieving the stated aims of the Ad Hoc Tribunals would be to equate progress with the number of prosecutions. If a general move from impunity to accountability for atrocity crimes, was marked by 'more prosecution for more offences', then it would follow that - those rules of evidence and procedure which inhibit or obstruct the number of successful prosecutions, might be viewed as antithetical to progress. However rules, to the extent that they place limits upon prosecutions and judicial discretion, and place appropriate checks and balances, provide the normative guidelines and the moral authority for decision making. "It would be an acute error to trivialise the Courts procedural development" [135]

> *The process by which defendants are tried is as important as the judicial outcome in the assessment of progress. This is especially so, given that international criminal law enforcement mechanisms impose severe restrictions and penalties. Ambiguous terms in the criminal contest fail to give the specificity and precision that a court must rule upon in upholding the rule of law.*[136]

On a practical, rule by rule basis, we need to get the balance right, ensuring the incorporation of appropriate human rights standards, and the requisite guarantees for a fair trial. But broader questions also need to be asked. Considerations of the procedural system as a whole, are rarely addressed in the academic commentaries, in favour of a focus upon the ' nuts and bolts' of substantive and procedural aspects. It is common to see normative assertion made as being self evident[137].

For instance Michail Waldimiroff in his commentary on the rights of the accused makes the assertion that;

> *the defence counsel exclusively defends the interests of his client; he is not to defend any other interests which may conflict with his client's interests. He fights any and all infringements of the defendants rights and will always strive to achieve the most favourable outcome for his client . He is obliged to employ his juridical expertise unreservedly for the benefit of the defendant.*[138]

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[135] Lietzau W.K. Symposium: Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court 32 Cornell Int'l L.J. 477 at p477

[136] Lietzau W.K. Symposium: Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court 32 Cornell Int'l L.J. 477 at p 488

[137] Combs N. A. "Book Review: International Criminal Jurisprudence Comes of Age: a Substance and Procedure of Emerging Discipline: Substantive and Procedural Aspects of International Criminal: The Experience of International And National Courts", 42 *Harvard International Law Journal (2001)* p555 at 568

[138] Michail Waldimiroff, 'Rights of Suspects and Accused' in : *Substantive and Procedural Aspects of International Criminal: The Experience of International And National Courts* ; Gabriel Kirk McDonald and Olivia Swaak- Goldmann eds., 2 vol. (2000) p419, 421-422

Combs[139] makes the point that whilst this assertion might describe an adversarial understanding of the role of defence counsel, practitioners from inquisitorial jurisdictions might view the role, not as agent, but rather as an; "independent organ of the administration of justice"[140]. So as to avoid practitioners and judges approaching their tasks from their own centric viewpoint, the discipline of international criminal law needs to develop its own trial theory, as an umbrella to draw all the parties under a common purpose. This especially the case a we move to utilise the permanent machinery of the international criminal court.

Some Comments on the ICC Rules of Practice;

The preparatory commission of the international criminal court finished its work on the ICC Draft Rules of Procedure in Evidence, on 30 June 2000. These rules constitute a significant development in the area of procedural law before international criminal courts, and reflect the requirements for a fairer and effective adjudication of international crimes.

These rules were a result of lengthy and complex discussions had by delegates to the Preparatory Commission Sessions (PrepCom) and Diplomatic Conference for the ICC. The core of procedural principles that were settled upon, constitute an extensive elaboration of, and often a substantive departure from, the rules of the *Ad Hoc* tribunals.[141]

'The normative picture is completed by the Rules of Procedure and Evidence for the ICC' which incorporate the necessary detail to ensure effective operation of the Court. This supplementary body of law, ensures that the ICC will operate in a much more rigid legal setting than its Ad Hoc Tribunal predecessors, and will not be amened without the adoption of the proposed rule change by two thirds majority of the members of the Assembly of State Parties.[142] Accordingly, the Rules will 'become a repository for those standards and working methods which only experience will clarify'.[143]

The reason for this is that the ICC due to its treaty based character, is reliant upon broad ratification. Indeed, the effective exercise of jurisdiction is dependent upon consensus. It follows then, that the method of elaboration and adoption of rules (and amendments) is consensual.[144]

This shift to a consensus based jurisdiction, has led to the rejection of the system, which operated at the Ad Hoc Tribunals, were judges were entrusted with the function of

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[139] Combs N. A. 42 *Harvard International Law Journal (2001)* p555 at 569

[140] Luban, D The Sources of Legal Ethics; A German American Comparison of Lawyers Professional Duties 48 Rebel Zeitschrift Fur Aluandisches und Internationales Privatrecht, (1984) 245 at p 266.

[141] Lee R.S., (eds) *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999) at 218.

[142] ICC Statute Article 51 (1).

[143] Broomhall B., ' Article 51' in O Triffterer (ed.*) Commentary on the Rome Statute of International Criminal Court* (1999) at page 683.

[144] Dicker R., and H Duffy, ' National Courts and the ICC', *Brown Journal of World Affairs* (1999) p.56 – 57. See also, B Broomhall, ' Article 51' in Triffterer (ed) *Commentary on the Rome Statute of International Criminal Court* (1999) at p. 683

adopting an amending the rules of procedure. The negotiators of the Rome Statue wished to leave "as little room is possible for judicial development of procedural rules".[145]

After much debate, the Statute for the creation of the Court was adopted at an international conference in Rome on July 17, 1998.[146] And the International Criminal Court was formed. The ICC together with the Ad Hoc and hybrid predecessors, represents an attempt to fill the void in international criminal enforcement. However it is a misconception to believe that movement in a particular direction is either linier or progressive. The developments in the field are perhaps best seen as a balance paradigm between competing interests in justice.

If the rules of practice to emerge from these Ad Hoc tribunals are in their infancy, then the newly formed Statute of the International Criminal Court and its accompanying Rules are even more recent and largely untested.

From the outset the two Tribunals differ substantially from the ICC in terms of jurisdiction and purpose. The ad hoc tribunals are both temporally and geographically limited as special remedial courts set up to address a discreet body of crimes which were clearly defined as to, time and space. Once the work of the Tribunals is finished, the machinery will be dispanded. By contrast the ICC is a permanent court, with worldwide jurisdiction over an amorphous body of future crimes.[147]

As the proposal for an international criminal court grew momentum the draft rules incorporated more civil law elements, such that today the Rome Statute is more of a compromise between the influences. The ICC is destined to be more of an amalgam of criminal procedure than its predecessors as it precariously straddles common and civil law in order to achieve the consensus of the participating states.[148]

Many of the fair trial standards incorporated into the Statute of the International Criminal Court represent a 'lowest common denominator' group of rights that survived the process

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[145] Guariglia, F., 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of International Criminal Responsibility' in; A. Cassese et al (eds) *The Rome Statue and of the International Criminal Court: A Commentary*., volume II (2002) p1111, at p.1115.

[146] After intense negotiations, 120 countries voted to adopt the treaty. One hundred thirty-nine states have signed the treaty as of mid-2004. Sixty-six countries – six more than the threshold needed to establish the court - ratified the treaty on April 11, 2002. This meant that the ICC's temporal jurisdiction commenced on July 1, 2002. In February 2003, the Court's Assembly of States Parties - the ICC's governing body - elected the Court's first eighteen judges. The resulting high quality and diverse judicial bench (the judges include 7 women and represent all the regions of the world) were sworn into office on March 11, 2003, in The Hague, the seat of the court. On April 21, 2003, the Assembly of States Parties elected the chief prosecutor, Luis Moreno Ocampo. As of 17 March, 2005, ninety-eight countries have ratified the ICC treaty.

[147] Leitzau, W.K., 'Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court', 32 *Cornell Int'l Law Journal* 477 at p.482

[148] Creta V.M., The Search for justice in the Former Yugoslavia and Beyond: Analysing the Rights of the Acused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia., 20 Housten Journal of International Law (1998) 381 at 415.

of negotiation and compromise, amid the impetus for a uniform and definite corpus of international law. The Rome Statute contains many of the fair trial guarantees set out in the Statutes and Rules of the two tribunals, with little progression.

It is still to early to assess the degree to which the Rome Statute has struck a balance between divergent procedural traditions, in practice. This is why the UN Special Panel for Serious Crimes in East Timor, which transplanted the Rome Statute into a domestic tribunal, is not only the first practical example of the rules in practice, but also a precursor for things to come. Timor's Special Panel is instructive and invaluable for practitioners in assisting to iron out the procedural conflicts and reconcile inherent tensions that exist.

To the extent that they have been tested, by largely wholesale adoption at a domestic level, by the hybrid tribunals of East Timor are Sierra Leone – we will explore later.
To the extent that the ICC rules have further adjusted the balance between the parties, and incorporated a greater degree of civil law traditions – we shall examine here.
Rules of procedure in the terminology of HLA Hart, are 'power conferring rules'.[149]

> *As such they define the preconditions for the valid exercise of an authority, as well as its scope and limits. Accordingly, rules of procedure have an inherent power- limiting function, since they establish when, and how, legally conferred powers may be validly exercised.*[150]

James Crawford makes the observation that in the preparatory work leading to the Rome Statute, there was a 'tendencies of each duly socialised lawyer to prefer his own criminal justice systems' values and institutions'[151]

> Where different accused persons are faced with different procedures international criminal justice is open to the complaint that different accused are treated differently, some more fairly than others. Inconsistent procedures make it more difficult for lawyers to prepare for trial since they may not know what procedures apply until the trial actually begins. [152]

So the battle between the two legal traditions was superceded by the need to ensure participation in the new internationalised criminal legal system, as concensus was the factor that not only attributed legitimacy but also jurisdiction. At first, the world community was prepared to, allow the Ad Hoc Tribunals flexibility and leave the devil in the detail, leaving procedural prescription intentionally vague. Ad Hoc Judges not only drafted their own Rules of Procedure and Evidence, but in plenary sessions were

[149] Hart H.L.A., 'The Concept of Law', (1994) at p. 96-99.
[150] Guariglia, F., 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of International Criminal Responsibility' in; A. Cassese et al (eds) *The Rome Statue and of the International Criminal Court: A Commentary*., volume II (2002) p1111, at p.1116.
[151] Crawford, J., 'The ILC Adopts a Statute for the International Criminal Court', (1995) 89 AJIL at p. 404.
[152] Keen 'Tempered Adversariality', *Leiden Journal of International Law* Vol 17 (2004) at p. 813

empowered to tailored the rules through a series of amendments. But the situation was somewhat different in the negotiations leading to the Rome Statute.

Whilst the International Law Committee predicted that the Statute for the International Court would be; *"[p]rimarily an adjectival and procedural instrument",*[153] which gradually contemplated a 'judicially led process to determine the scope and content of much of the ICC's legal substance and procedure'.[154] The later work of the preparatory committee however, favoured a cautious approach with explicit directions and near exhaustive definitions . As such, there is a substantive difference between the normative context in which the organs of the ICC will operate and that of its predecessors.

> *Procedures before both ad hoc tribunals are governed by systematic statutory provisions and by flexible and broad rules of procedure in evidence, that may be amended in plenary sessions by the majority of judges. The ICC proceedings, by contrast, will be regulated by very detailed provisions contained in the Statute itself – therefore subject to a rigid scheme of amendments - and by similarly detailed provisions in the rules of procedure in evidence, also subject to a stringent regime of amendment…"*[155]

The basic differences between the ICTY rules and the ICC rules, is the degree of regulation contained in the procedural principles and provisions, that governed criminal proceedings.'The ICC statute contains a full procedural scheme' devoting three of its 13 parts to purely procedural issues.[156]

So as international criminal law has developed as a discipline, its processes have been attributed greater predictability.

> *Consistency in a procedural system can only be achieved when those on the participating in the system share a common understanding of how it is supposed to operate. This common understanding cannot arise by achieving consensus on how each and every procedural rule should be*

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[153] *Report of the International Law Commission on its 46th Session* UN GAOR, 49th Sess. No.10, at 43 U.N.Doc. A/49/10 (1994) at 71-7, p4

[154]Broomehall, B., 'Developments in Criminal Law and Criminal Justice: Looking Forward to the Establishment of International Criminal Court: Between State Consent and the Rule of Law, 8 *Criminal Law Forum* 317at p. 323

[155] Guariglia, F., 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of International Criminal Responsibility' in; A. Cassese et al (eds) *The Rome Statue and of the International Criminal Court: A Commentary*., volume II (2002) p1111, at p.1113.

[156] Guariglia, F., 'The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of International Criminal Responsibility' in; A. Cassese et al (eds) *The Rome Statue and of the International Criminal Court: A Commentary*., volume II (2002) p1111, at p.1113.

> *applied. Such consensus would be impossible to achieve, as it is achieved by the continual and ongoing debate in national systems about the way in which specific evidentiary rules, or specific provisions, of procedural codes should be applied. Common understanding arises out of a shared agreement on the theories underlying the procedural system, and the roles to be played by the actors in that system.*[157]

Herein then lies the continuing dilemma. Whilst the rules have become more certain through enunciation and reduction to positive law, the practice is still never the less unsettled.

> *The cobbling together of common and civil law traditions erodes the rights of the defendants. Both of these systems offer protections to an accused through different means. But these protections are endangered when elements of both systems are appropriated and combined to form a new legal process*[158].

This is because there is no agreed underlying theory upon which the practice is based.

> *If we are to understand the role of the parties, the procedural requirements of the trial, and the terms under which evidence can be admitted, then we need to attempt to evaluate these in the context of the overall system in which they are expected to operate.*[159]

There must be an agreed recognisable philosophy behind the trial process. If the rationale behind the civil law criminal trial is to arrive at the 'truth', and the rationale behind the common law criminal trial is the 'discharge of the burden of proof', then what forms the underlying theory of the international criminal trial which essentially combines these families of law.?

When the checks and balances are altered, potentially the trial process is radically different from the parent legal system from which it spawned.

There is no doubt that the balance between the parties has been fundamentally altered in international criminal practice. For some comparative law writers the main difference between, the common law accusatorial system and the civil law inquisitorial system is the extent to which state intervention in the proceedings is ascribed to the role of judge.[160]

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[157] Keen 'Tempered Adversariality', *Leiden Journal of International Law* Vol 17 (2004) at p. 813

[158] Johnson S.T., 'On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal of the former Yugoslavia' 10 *International Legal Perspective* (1998) at p. 111

[159] Combs N. A. 42 *Harvard International Law Journal (2001)* p555 at 569

[160] Damaska, " The uncertain Fate of Evidentiary Transplants; Anglo-American and contemporary experiments" 45 *American Journal of Comparative Law* (1997) at page 839. See also, Tulkens, "Main

So too, the task of Prosecutor has been elevated to the key position, and will need to accommodated competing, if not conflicting, interests. ie; impartiality vs burden of proof, or the obligation to discover exculpatory evidence vs the role of adversary.

From an evidence gathering point of view, the balance has also shifted. The accusatorial system reflects an 'atomistic' approach to evidence looking at each piece of evidence on its merits and making a final determination by aggregating the probative value of distinct pieces of evidence, whilst the inquisitorial system reflects a holistic approach to the evidence where "the probative force of any item of information arises from interaction among elements of the total information output"[161] The international criminal process has moved away from formalised rules of evidence in favour of allowing most evidence, and attaching probative value in the process of 'weighing up'. This means that the task of assessing a trial for the observance of fair trial guarantees is made difficult by the fact that the task of arriving at a final judicial determination is not transparent. We may only be given the benefit of knowing how a decision is arrived at, and upon what basis, to the extent that the judges set their thought out in their reasons for decision. This hands over much of the responsibility to the judges as 'professionals', to exercise their decision-making task in an internalised fashion, ruminating upon the probative value of evidence after they retire to chambers.

In addition, the influence of human rights law has impacted the trial process. Article 21of the Rome Statute provides that '[t]he Court… shall apply and interpret the law' in a manner "consistent with internationally recognised human rights" and without any adverse distinction. This is in large part a result of an increase in a body of case law emanating from Human Rights Courts.

Since the International Criminal Court is yet to begin hearing matters there is little evidence to draw upon. For this reason the Hybrid Courts, such as the Special Panel for Serious Crimes in East Timor and the Special Court for Sierra Leone, which have applied the principles of the Rome Statute at a domestic level, are an interesting prelude of things to come. As these Courts struggle for meaning, in a discipline that is in transition, they are highly instructive, highlighting the shortfalls and gaps in the trial process in practice.

Some Practical Observations; Defending Crimes Against Humanity in East Timor;

However the most recent international enforcement mechanism to emerge has been the internationalised domestic court, which mixes domestic and international components and cross fertilizes law, precedent and legal thought. The first hybrid model of this type, was established in East Timor and variations on this model have been implemented in

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Comparable Features of the Different European Criminal Justice Systems" in; Mireille Delmas-Marty (eds) *The Criminal Process and Human Rights; Towards a European Consciousness* (1995) page 5-13

[161] Damaska, " Atomistic and Holistic Evaluation of Evidence: A Comparative View" in David S. Clark (ed.) Comparisons and Private International Law; Essays in Honour of John Merryman 91 –104.

Sierra Leone and Kosovo, and proposed for Cambodia. These hybrid criminal bodies incorporate national and international features, and apply a 'compound of international and national substantial and procedural law'. They are a family of their own, grafted onto the local judicial system, and in some situations are part of the local judiciary system.[162]

These hybrid model endeavors to combine the strengths of the ad hoc tribunals with the benefits of local prosecutions.[163]

> *The hybrid tribunal is one of the latest attempts to seek justice for crimes of mass atrocity. Designed partly in response to criticisms of the International Criminal Tribunal for the former Yugoslavia ("ICTY ")and the International Criminal Tribunal for Rwanda ("ICTR "),the hybrid model is a system that shares judicial accountability jointly between the state in which it functions and the United Nations.*[164]

Like the Ad Hoc Tribunals and the ICC, these Hybrid Tribunals share the goal of sanctioning serious violations of international law, and are established for the purpose of imposing criminal penalties. It is this key feature which bring the of of the these courts under the wider class of international criminal tribunals.

> *They can be seen as the product of a partnership between the State concerned and the United Nations, which has a considerable input into the design and structure of the court.*[165]

As an experiment model, questions about how these courts will operate in practice, is largely untested;

The hybrid model 's greatest risk is that rather than incorporate the best of the international and local judicial systems ,it may reflect the worst of both.[166]

In terms of outcomes, a comparison between hybrid courts and international tribunals, might prove misleading. It may be that these hybrid courts must accept that their role is less ambitious than the substantially better resourced Ad Hoc Tribunals. The quantity of cases prosecuted in East Timor for example, belies the qualitative inadequacy of the trials which will be discussed in ensuing chapters. It is questionable, for example, whether all of the accused in East Timor have been provided with an adequate defense.[167]

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[162] Project on International Courts and Tribunals,'Hybrid Courts' see; http://www.pict-pcti.org/courts/hybrid.html

[163] Katzenstein S., Hybrid Tribunals:Searching for Justice in East Timor' *Harvard Human Rights Journa*l Vol.16 p 245 at p245.

[164] Katzenstein S., Hybrid Tribunals: Searching for Justice in East Timor *Harvard Human Rights Journal* Vol.16 p 245 at p245.

[165] Linton S., 'New Approaches to International Justice in Cambodia and East Timor'. *IRRC* Vol. 84 No 845, page 93 at p 94.

[166] Katzenstein S., Hybrid Tribunals:Searching for Justice in East Timor Harvard Human Rights Journal Vol.16 p 245 at p2456

[167] Katzenstein S., Hybrid Tribunals:Searching for Justice in East Timor Harvard Human Rights Journal Vol.16 p 245 at p253

The hybrid model may encourage the international community to mistakenly equate prosecutions with justice, leading to "a false sense of accomplishment " and complacency.[168] It may inadvertently undermine "the very standards of justice and the rule of law " that it was intended to promote.[169] As JSMP has stated,

"a wide 'margin of appreciation ' on international human rights standards is both confused and dangerous. It assumes that the mechanisms of a justice system can be established without the principles and standards necessary to safeguard its operation."[170]

Opting for compromised justice in the short run, may set the stage for an inferior justice in the long term.

The Special Panels for Serious Crimes is a creature of the United Nations Transitional Authority in East Timor (henceforth UNTAET) as an integral part of the local court system, and directly transplanted the text of the Rome Statute for the International Criminal Court in order to prosecute those suspected of 'serious human rights violations committed in East Timor'.[171]

UN Special panel for Serious Crimes was a court set up to hear charges of international crimes , specifically matters arising out of indictment issued in relation to alleged events occurring after the August 1999 referendum in East Timor. Similar to the International Criminal Tribunals - for the Former Yugoslavia and Rwanda, but with one very real departure. The Special Panel for Serious Crimes, was to operate as a domestic court with power to hear matters of international significance.

The UN Administration promulgated regulations that set out the operation of the justice system, and a comprehensive collection of rules of evidence and procedure that govern the operation of the Special Panel. The result has been an experiment in internationalised justice which is an adjunct to the Dili District Court.

On March 6, 2000 the Transitional Administration passed regulation 2000/11 that set up both the functions and the regulations of the judicial system for the transitional period of East Timor. Section 10.1 of Regulation 2000/11, provided that the District Court or exclusive jurisdiction over the offences of genocide, war crimes, crimes against humanity, rare, sexual offences, and torture. Section 10.3 set up the entity and

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[168] Suzannah Linton,Rising from the Ashes:The Creation of a Viable Criminal Justice System in East Timor ,25 Melb.U.L.Rev.122,178 (April 2001) at p177

[169] David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?(East-West Center, Asia Pacific Issues No.61,August 2002),available athttp://www.jsmp.minihub.org/Resources.htm.

[170] Press Release, Judicial System Monitoring Programme, East Timor Urgently Needs Court of Appeal to Guarantee Fundamental Human Rights (Oct.14,2002), at ; http://www.jsmp.minihub.org/News/14N_10_02.htm.

[171] Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', *Harvard Human Rights Journal*, Vol.16, 245.

composition of the Special Panel, which was later to be elaborated upon by regulation 2000/15.

A panel of judges within Dili District Court was established with exclusive jurisdiction over serious criminal offences including genocide, war crimes and crimes against humanity. Two international and one East Timorese judge sits on this panel known as the *Special Panel for Serious Crimes.*

There are effectively three Chambers, the Pre-trial, Trial and Appeal chambers. A new element additional to the Indonesian system is the role of investigating judge whose main responsibility is to preside over pre-trial matters and safeguard the rights of suspects and victims by ensuring that procedures are correctly applied.

A public prosecution service (or the Serious Crimes Unit) was set up under UNTAET Regulation No. 2000/16 of 6 June 2000. Under the regulation public prosecutors are authorised to bring criminal actions before the court and are responsible for conducting criminal investigations, including directing and supervising police investigations. cut in accordance with section 27 of UNTAET Regulations 2000/11 of March 6, 2000 which made express provision for the right to legal representation, a nucleus of a public defenders office was established drawn from a relatively small pool of inexperienced lawyers. This small public defenders unit has for the most part has been possible due to NGO support, offerings of pro bono assistance and a negligible UN budget.

It was however not until June 2000 that the implementing legislation was enacted. Regulation 2000/15 passed on 6 June 2000 builds upon the regulations of 2000/11 and describes the legal framework for the investigation, prosecution and trial of crimes of genocide, war crimes, crimes against humanity, murder, sexual offences and torture.

Along side the establishment of a hybrid court in Dili, a complimentary court was established in Jakarta, as a result of the findings of the Indonesia's Commission of Inquiry into Human Rights Abuses in East Timor (published 31 January 2000). The matter was subsequently taken over by the Attorney General.

On 6 November 2000, legislation providing for the establishment of a Human Rights court to try cases of human rights abuses in East Timor, passed through the Indonesian People's Consultative Assembly. President Megawati Sukarnoputri, subsequently approved a list of 18 judges to preside. There was to be a cooperative approach to the prosecution of offences shared between this Indonesian Human Rights Court and the Special Panel in Dili.[172]

Trials began before the Special Panels of the Dili District Court in early 2001.
As for the Special Panel in Dili, inherent in the domestic nature of the tribunal is its foremost weakness - the inability to arrest and bring to trial individuals outside the jurisdiction of the court. This largely means that Justice in East Timor is reliant upon the

[172] Memorandum of Understanding between the Republic of Indonesia and UNTAET regarding Cooperation Legal Judicial and Human Rights Related Matters, (April 6 2000).

cooperation of Indonesia. As most of the more prominent indictees reside in West Timor or Indonesia, to date the true authors of the 1999 atrocities have evaded the courts jurisdiction.

As a general rule, two sets of positive law are to be applied by the Special Panel; (i) the domestic law (or the Indonesian Penal Code KUHAP) and; (ii) the international regulations, which are the instruments from which the Special Panel derive its authority.[173] The Transitional Rules take precedence over, the Indonesian Criminal Procedure Code. To the extent that the two are inconsistent, the Regulations will prevail. Equally where criminal procedures are not specified by the Transitional Rules (in as far as the provisions in the Indonesian Code conform to international standards) the Indonesian law will apply *mutatis mutandis*. This arrangement in itself leads to confusion as to which law is appropriate to apply .

The requirements set out under S.3 of UNTAET Regulation 1/1999 are difficult to implement in practice as the decision as to which laws are consistent with international regulations and human rights standards, is a matter of interpretation.[174] The formula for deciphering applicable laws, is a complex task of interpreting the Indonesian Penal Code 'through the lens of international human rights instruments' in a discovery process of which laws to discard and which to substitute.[175]

The ambitiousness of the system established by the UN in East Timor should not be underestimated: An entirely new system of law, the Rome Statute for the International Criminal Court (ICC), was being used for the first time anywhere in the world. It was to be implemented in a court system which had been decimated by the Indonesian withdrawal.

There were almost no qualified lawyers in East Timor, no functioning courts or court system, and no-one with any experience of how a court system should operate. One of the first international lawyers to work within the Serious Crimes Unit in Dili, Susannah Linton, writes the following:

> *…it is not known why it was felt that the legal regime designed for the ICC could realistically be implemented in the district court of one of the world's poorest nations. […] It is no easy matter to investigate, prosecute, defend and try international crimes, particularly if this is to be carried out with due process, full respect for the rights of the accused and in a way which focuses on those most responsible.*[176]

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[173] See Section 3 of UNTAET Regulation 1/1999.

[174] There has also been the difficulty of translating documents for the purposes of assessing their import. In the early phase of the UN mission the judiciary and civil police struggled to interpret and apply existing law and then accommodated the UN Regulations as they superseded, clarifying and amending and the criminal procedure.

[175] Strohmeyer H., 'Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timo' 95 AJIL (2001) p.59.

[176] Susannah Linton Cambodia, East Timor and Sierra Leone: Experiments in International Justice Criminal., Law Forum Volume 12, 2001, at 213-5

Setting up a international justice system from the ground up, would require a massive injection of resources, backed by a determined political will, both of which have been notably absent in the case of East Timor.

The result, is a system characterised by a backlog of cases, defendants being kept in custody for unacceptably long periods awaiting trial (a period of two years or more pre-trial custody is not unusual), an astonishing lack of competent judges and judicial staff, no library of texts, and severe understaffing of translators despite trials being relayed across three languages . Attempting such an ambitious project , with so little resources fundamentally detract from, and undoubtedly compromised, the standard of a fair trial.

If the initial commitment of resources was insufficient this was amplified by the process of phasing out the international justice programme after East Timor gained full independence.[177] Downsizing of the Serious Crimes Unit began since August 2003. The number of UNPOL investigators at the SCU has been reduced from 23 to 8 in December and the number of UN Investigators has also been reduced from 13 to 9. In reality, there are still 88 murder cases pending investigation (as of September 2003). Accordingly, there will be cases in East Timor in which crimes against humanity have been reported but investigation has not been completed.[178]

But the Special Rapporteur so wisely predicted that the;

> "*as yet unformed East Timorese judicial system could not hope to cope with investigations into atrocities of this scale"*

The report went on to say that;

> *" the best efforts would be unlikely to result in complete investigations into a full range of crimes."*[179]

Of the estimated 1,400 murders that took place during 1999, the Serious Crimes Unit was expected to have completed investigations into only 40 to 50 per cent by May 2004 when the UN mandate was due to expire.[180] Whilst the mission has been given an extension [181] the UN Secretary General estimated that the preparation of indictments related to the

[177] As at the time of independence the United Nations Transitional Administration for East Timor (or UNTAET) handed over authority to the duly elected Timorese government. TheUN continued to sponsor the formalized justice process under the United Nations Mission in Support of East Timor (or UNMISET), however as at the point of independence, the UN began to implement its exit strategy, phasing out the international support over time.
[178] Judicial System Monitoring Programme, The Future of the Serious Crimes Unit, pp. 5-7
[179] Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc A/54/726,S/2000/59 (2000), at paragraph 153.
[180] Amnesty International & Justice System Monitoring Programme, Indonesia, Justice for Timor-Leste:The Way Forward, 14 April 2004, p 21
[181] JSMP Press release ??

cases of murders would require at least another year after the conclusion of UNMISET's mandate.[182] With the exception of the work of the Truth and Reconciliation Commission,[183] the eventual closure of the Serious Crimes Investigation/Prosecution Unit in the near future will leave much unfinished business in the serious crimes process in East Timor.

Notwithstanding the shortcomings of the Special Panel for Serious Crimes in East Timor the tribunal has nevertheless proceeded to try and convict numerous defendants . These trials shift the focus from the general political and social context within which international justice is being pursued, to specific considerations of procedure and practice. As tribunals emerge as a response to the internationalisation of criminal trials, a consequent machinery for investigating and trying crimes emerge. These international bodies create international criminal law jurisprudence and apply rules governing evidence and procedure, informed by international human rights instruments. The question then, is to what extent are human right guarantees being protected, enforced and upheld before international courts authorised to hear matters referred them.

There are serious concerns that international human rights standards are not being fully respected before the Special Panel in East Timor. Some of these problems have gradually been addressed, whilst others persist, continuing to impact negatively upon the fairness of

[182] UN Document S/2003/944, Report of the Secretary-General on the United Nations Mission of Support in East Timor, 6 October 2003

[183] In January 2002 East Timor launched the Commission on Reception Truth and Reconciliation for the purpose of investigating relatively less serious crimes against humanity by all sides from the start of Portugal's decolonisation programme in April 1974, until the departure of the Indonesian occupation forces in October 1999. Note; The temporal jurisdiction of the truth and reconciliation process gives much wider scope than the formal justice process which is limited to a narrow time frame. See Section 10.2 UNTAET Reg 2000/11 "With regard to criminal offences listed…the District Court of Dili shall have exclusive jurisdiction *only in so far* as the offence was committed in the period between 1 January 1999 and 25 October 1999." (emphasis added)The Commission was initially proposed by the sole political party, CNRT, and then developed by a committee comprising representatives of CNRT, six East Timorese NGOs,UNHCR, and the UNTAET Human Rights Unit. The Commission was expected to operate for at least two years. It had no judicial function but had extensive powers to investigate crimes and to hand over evidence from any investigation to the courts in Dili.[183] While it did not have the power to grant amnesty, the Commission was able to provide immunity from prosecution to the perpetrators of less serious crimes if they fulfilled a community reconciliation agreement. The seven commissioners were trained by experts from the International Center for Transitional Justice which helped similar commissions in South Africa and Guatemala. See *Agenc France- Presse* 21 January 2002. This conciliation effort in particular encouraged former pro-Indonesian militias to return from the refugee camps in West Timor to be integrated with their home communities. An individual who has committed a less serious offence and wishes to use the community reconciliation process should take the following steps: contact an office of the Commission, submit a written statement, participate in a hearing, and undertake an act of community reconciliation. By the end of January 2003, the Commission conducted hearings in 10 of the 13 districts and 203 witnesses had voluntarily provided statements to the Commission, and a hearing has been completed for 103 of these witnesses. See *UN Commission on Human Rights, Situation of Human Rights in Timor-Leste: Report of the United Nations High Commissioner for Human Rights*, 4 March 2003.According to the report of the UN High Commissioner for Human Rights, there is a willingness on the part of perpetrators to submit to these hearings, and community leadership and participation at the hearings have been active. See in particular para 31 of this report.

the trial and the rights of the accused. Many of the weaknesses stem from the fact that the hybrid international court has been grafted to a weak domestic criminal justice system.

But it all depends upon how we measure success. As a new method of achieving accountability the hybrid model can be applauded. As an institution builder, the International Serious Crimes Project has set a high standard, and crafted a judicial system as a by-product. In terms of cost effectiveness, the Special panel has achieved a great deal with a limited budget. But these are considerations, which are relevant, only so far as policy makers are concerned. Legal considerations are very different.

From a defence practitioner's perspective, the concerns are; To what extent are the rules of evidence and procedure, being competently applied? To what extend are fundamental safeguards being observed? To what extent is the defendant being afforded a full, fair, equal and public hearing? To what extend do the court practices conform to international standards enshrined in treaties?

The answers to these enquiry help us to understand and analyse whether there is being afforded the universal requirements of a fair trial. And the best illustration of this, is to follow an individual trial from arrest through to its ultimate conclusion. The next two Chapters will attempt to do just that, looking at the *Lolotoe case* and the trial of Jose Cardoso, in an effort to highlight the procedural and evidentiary inconsistencies in the international criminal process, as they relate to a particular accused.

In terms of priority, the Prosecution arm of the judicial process (or the Serious Crimes Unit, SCU) was established in 2000. This was then followed by the appointment of the first judges to the Special Panels at the end of that same year. However it was sometime later before any attention was paid to the right to a defence. Judge Rapoza makes the observation that it is;

> *A somewhat telling fact is that the Defense Lawyers Unit was not opened until September 2002 and did not attain significant staffing until April 2003.*[184]

Despite being under resourced and under prioritized, and Public Defenders Unit managed to provide legal representation for virtually every defendant who came before the Court, all of whom were without the financial means to retain private legal representation. In the summation of judge Rapoza;

> *The Unit has slowly evolved to the point where it is now possible to speak of the "equality of arms" between the prosecution and the defense.[sic]*[185]

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[184] Rapoza, Judge Phillip,'The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned. Delivered on 28 April 2005 in Dili, Timor-Leste at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned. Judge Rapoza was a presiding International Trial Chamber Judge before the UN Special Panel for Serious Crimes.

[185] Rapoza, Judge Phillip,'The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned. Delivered on 28 April 2005 in Dili, Timor-Leste at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned.

Signing off on the Special Panel for Serious Crimes mandate in East Timor Judge Rapoza presented a report card to an international Symposium reflecting upon the accomplishments and lessons learned.

> *The SCU has filed 95 indictments charging 391 persons with serious crimes. As some accused appear in more than one indictment, the total number of defendants is 440.*[186]

Of those that came before the court:

> *87 were tried to a verdict, 13 had their cases withdrawn or dismissed and 1 was found not mentally competent to stand trial. Doing the math, this means that 339 defendants have not come before the court, presumably because they are outside the country. …In the absence of an extradition treaty with Indonesia, where the overwhelming majority of absent defendants are located, no prosecutions can proceed in these cases.*[187]

Notwithstanding the absence of many of the major indictees in the jurisdiction the Special Panels have nonetheless, issued over 263 arrest warrants before the Court closed on May 20, 2005. Despite the unfinished work, in 2004 the Security Council Resolution 1543, drew to a close the mandate of the Special Panel and its supporting entities, making the work of the Panel a completed experiment. Not only was it the first hybrid court in the world to be established, but also it is the first of its kind to complete its mandate. This means that the trial processes, and the conclusions to be drawn are both highly significant and instructive. To this end, the international community will wait to see what the Commission of Experts will conclude.

Judge Rapoza make the criticism that from the outset the mandate was vague and unspecified, suggesting that the model was unclear and the expectations as to what standard the serious crimes process would meet, was uninformed.

> *The failure to provide a clear focus to the serious crimes mandate in East Timor was crucial, as it meant that there was no distinct picture of what model the serious crimes process was to resemble. Was it to operate like the ICTY in The Hague or the ICTR in Arusha and be held to the same demanding standards? Or was it more in the nature of the process in Kosovo where international judges sit within the national judicial system and render justice in criminal cases including, but not limited to, serious crimes.*[188]

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[186] Rapoza, Judge Phillip,'The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned. Delivered on 28 April 2005 in Dili, Timor-Leste at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned.

[187] Rapoza, Judge Phillip,'The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned. Delivered on 28 April 2005 in Dili, Timor-Leste at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned.

[188] Rapoza, Judge Phillip,'The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned. Delivered on 28 April 2005 in Dili, Timor-Leste at the International Symposium on UN Peacekeeping Operations In Post-Conflict Timor-Leste: Accomplishments and Lessons Learned.

For future reference, it will be important to clarify the criteria so that we can better measure performance, against a 'yardstick'. If we measure the success according to the seniority and profile of the defendants, the process fell short of the mark. Alternatively, if we assess the Serious Crimes process from a policy perspective, we might conclude that as a method of recording the events, in an effort to document and move beyond them, the trials and their outcomes are a significant step on the road to collective healing.

However if we assess the proceedings from the purely legal perspective of due process, there are many procedural and evidentiary weaknesses that can be identified that detract from the overall obligation to meet international standards of a fair trial.

Civil and Common Law tensions in international criminal law procedure have led to an uneasy amalgam of rules and unsettled practice, reliant upon the various constitution of each judicial panel/tribunal convened and the various schools of legal tradition from which they come.

RECOMMENDATIONS;

1. A separate international legal culture

> *The civilised countries of the world vary in their technical rules. Some require juries in criminal cases, others do not. Some prefer an inquisitorial procedure, others a litigious procedure. Some, especially those utilising juries have rigorous rules of evidence, others leave the court a wide freedom to examine and weigh every sort of evidence. Some will not admit criminal liability unless the offence and its penalty were very precisely defined by the law before the act was committed, others leave the tribunal a considerable latitude to find criminal liability and determine penalties on the basis of general definitions of offences and principles of law. International law can not apply the technicalities of any one system of municipal law, but must discover the general principles underlying all civilized systems of law and the customs inherent in international practice as evidenced by conventions, diplomatic discussions, and opinion of international tribunals and text writers.*[189]

While international law may have drawn from the various legal traditions, this does not mean that these influences continue to shape it operations . Having spawned a new legal culture, these rules must create their own internal logic.

2. Reliance upon the literal

Positive laws substitute for a unitary legal system and in the tradition of the Procedural Natural Law theorists an agreed and predictable set of fair rules protect the individual from the excesses of power exercised over them, and a guarantee against an arbitrary

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[189] Wright Q., 'Due Process and International Law'., 40 *AJIL* (1946) p398 at p.402

finding. This also ensures that international criminal trials move away from the political context that invariably surrounds them.

A unified and credible implementation of international criminal procedure and a pragmatic acceptance that there can be no single author when the texts of the world legal traditions and interpretations are so many.[190]

In the absence of a unitary sovereign authority, to a large extent, the solution lies in a heavy reliance upon the agreed text. The judges at Nuremberg circumvented many jurisdictional and procedural issues by grounding their authority in the Charter as an authoritative instrument, as did the Ad Hoc Tribunals rely heavily upon their Statute and Rules to enlighten the trial process.

Today given the existence of the Rome Statute, which contains provisions extensively debated, and arrived at by concurrence, it is possible to talk about an original text. A recommendation of this paper is that each authentic text hereafter enacted shall contain a deeming provision. That is, terms of the rules of practice shall have the same meaning in each authentic text, as they do in the 'original text'. In this way practitioners of international criminal law, can give priority to the clear and ordinary meaning of the text with recourse, where necessary, to the original text and the accompanying commentary which sets out the legislative intent.

3. Promotion of Best Practice.

The emerging international criminal law judicial form is a supernational role. This permits a harmonisation of a system of control and coercion which protects, develops tutors and administers a blueprint model of 'best practice'

This is especially so, where the United Nations take on the supranational role, as administrator of a territory and installs a blueprint for a new form of law and order. Here the obligation of the UN and its affiliated institutions is to implement world 'best practices'. East Timor is a case in point, where the implementation of regulations that establish institutions to administer international law, effectively requires the UN Administration to step into the breach to fulfil the role of bearer of progressive values. Vital to the execution of its duties is the proper guarantee that it will establish a blueprint legal system, that is both unambiguous and robust in its trial process. In this way we can be assured that the international criminal law machinery that is grafted on to the domestic system, is not harnessed to the security priorities of the victorious powers. Only an agreed and uniform system of trial will secure the proceedings beyond the political.

4. Adpotion of the Third Optional Protocol of the ICCPR

In 1993 the Sub-Committee on Prevention of Discrimination and Protection of

[190] Orford, A., *The Destiny of International Law*, p 449.

Minorities[191] proposed to the States parties a *Draft Third Optional Protocol* to the ICCPR.[192] The Sub-Committee set out a case establishing article 9 and 14 of the Covenant as non-derogable rights;

The Human Rights Committee rejected the proposal on the grounds that;

> *The Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States parties to feel free to derogate from the provisions of Article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency. The committee is also of the view that it would simply not be feasible to expect that all provisions of Article 14 can remain fully in force in any kind of emergency. Thus, the inclusion of Article 14 as such, into the list of non-derogable provisions would not be appropriate.*[193]

This has meant that despite a substantial convergence on the non-derogability of most basic elements of a fair trial, there is no compulsion to comply with Article 14 in times of state emergency.

However, the arguments for adopting the Third Optional Protocol are compelling. These are that (a) the right to a fair trial is not incompatible with emergency powers (b) that it is possible to show that there is sufficient legal interpretation to demonstrate *opinio juris* in favor of the non derogability of the right to a fair trail and; (c) that the right to a fair trial in emergency situations is indispensable to the enjoyment of any other right.[194]

Not incompatible with State Emergency Powers;
As stated in an advisory opinion of the Inter American Court of Human Rights (ACHR)

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[191] In resolution 1989/27 of 1 September 1989, the Sub-Committee appointed two of its members as special rapporteurs to prepare a report *on existing norms and standards pertaining to the rights of a fair trial. The Sub –Committee also requested that the rapporteurs recommend which provisions guaranteeing the right to a fair trial should be made non-derogable.(see para 1 The Final Report by Stanislav Chernichenko and William Treat cited below.)*

[192] Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities,46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62. See;(http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument).

[193] Human Rights Committee 1994 Report to the General Assembly, Vol. I, p. 120, Official Records, Forty-Ninth Session, Suppl. No. 40 (A/A9/40) see also A de Zayas 'The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and other cruel, Inhumane or Degrading Treatment or Punishment' in D. Weissbrodt, R. Wolfrum (eds), *The Right to a Fair Trial*, Berlin 1997 p669 at p677.

[194] Meron T., "On a Hierarchy of International Human Rights" *American Journal of International Law*, vol 80 (1986) p 1- 23 at p. 11

the only legitimate reason for derogating from the rights to a fair trial in a time of state emergency is "to preserve the highest values of a democratic society". The court went on to say that the suspension of judicial guarantees can not imply "a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times".[195] This is a view held by a vast majority of States, who do not consider that the enforcement of fair trial guarantees as incompatible with the 'maintenance and restoration of public order'[196]

Opinio juris in favor of the non derogability;
It may be the situation that whilst the right to a fair trial is not expressly listed as non - derogable in core international legal instruments, that courts and international institutions have nevertheless made authoritative pronouncements relating to the inviolable character of judicial guarantees.[197] In addition the statutes of the international criminal tribunals (ICTY, ICTR) and Rome Statute for the International Criminal Court have each unequivocally incorporated the provisions of Article 14 of the ICCPR wholesale.

The internationalization of the right to a fair trial has been examined extensively in this thesis. We have seen that through the evolution of the Doctrine, it has arguably attained the legitimate expectation, that at the very least the terms of Article 14 will be observed by international courts. Indeed it is not insignificant, that the *Rome Statute* sets out in Article 8(2) (iv) that an aspect of a crime of war is the passing of sentence and the carrying out of executions without the benefit of judicial pronouncement *"by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable"*[198]

Indispensable to the enjoyment of any other right;
The very fact that all other rights are dependant upon due process rights arguably means that the right to a fair trial is *de facto* non derogable. That is, implicit in the protection of non derogable rights is the presumption of procedural and judicial guarantees. This was a point made by the Human Rights Committee when it stated that;

> *…inherent in the protection of rights explicitly recognized as non-derogable…is that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.*

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[195] Advisory Opinion OC-8/87 of January 30, 1987 "Habeas Corpus in Emergency Situations (Art. 27(2)), 25(1) and 7(6), American Convention on Human Rights" para 20, 24.
[196] Laurent A, "The Meta- Judicial Effects of the Pronouncements Delivered by the ICC: International Human Rights Standards and State Responsibility" No.4, *Mexican Law Review* July-Dec 2005, See; http://info8.juridicas.unam.mx/cont/4/arc/arc6.htm. P8.
[197] See (1)The findings of the Human Rights Committee; General Comments 29 *"State of Emergency (article 4)"* at para 15 (2) Advisory Opinion OC-8/87 *Habeas Corpus in Emergency Situations Art 27(2), 25(1) and 7(6) American Convention on Human Rights,* para 25 (3) Advisory Opinion OC-9/87 Judicial Guarantees in States of Emergency (arts 27 (2), 25 and 8 *American Convention on Human Rights* para 25
[198] ICC Statute, Article 8 (2) (c) (iv).

Academics have supported this argument that the right to a fair trial provisions are indispensable insisting that "*Government should never restrict derogable rights in such a way that the enjoyment of non-derogable rights by the individual becomes futile.* [199] In his book *Towards an International Criminal Procedure,* Christoph Safferling[200] argues that human rights have extended beyond the traditional state boundary, and can be enjoyed by individuals in the international realm. This is, in part because of the intrinsic nature of human rights which attach to the individual, and can be protected regardless of the authority. These rights were designed to limit the arbitrary infringement of power, whether the institution be national or international. [201]

In fact a direct analogy between national and international criminal court jurisdictions is predominant, such that the requirement for international organs to be subject to the same human rights standards as domestic courts is now taken as a given. In deed the very competence of international organs to hear criminal matters, and the consequent transference of the matter to its jurisdiction, is dependant upon the capacity to extend the full complement of rights to a fair trial, effectively fulfilling the role where the state is unwilling or unable to do so itself. In these circumstances there can be no possible reason to derogate from the recognized principles of due process, because to do so, would be to undermine the very rationale for triggering its jurisdiction in the first place.

5. Uniformity in the Rules of Evidence and Procedure

The work of each of the international criminal law bodies are regulated by a separate set of statutory rules of procedure and evidence, which have been negotiated on an ad hoc basis. However they each possess common elements and approaches. To date the extent of diversity and similarities in the practice of international criminal law bodies, have attracted little attention. [202]

> *Consequently, the question arises as to whether the proliferation of international tribunals threatens the coherence of the international legal system. Not only may a cacophony of views on the norms of international law undermine the perception that an international legal system exists,* ***but if like cases are not treated alike****, the very essence of a normative system of law will be lost. Should this develop, the legitimacy of international law as a whole will be placed at risk.*[203]

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[199] Kooijmans, P.H., "In the Shadowland between Civil War and Civil Strife: Some Reflections on the Standard-Setting Process", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict, Challenges Ahead, Essays in Honour of Frits Kalshoven* (The Netherlands: Martinus Nijhoff Publishers, 1991), 225-247, p. 238.

[200] Safferling, CJM., *Towards an International Criminal Procedure* Great Britan, Oxford Press 2001

[201] Safferling, CJM., *Towards an International Criminal Procedure* Great Britan, Oxford Press 2001at pp 39-42 generally.

[202] Project on International Courts and Tribunals, 'Legal and Procedural Issues', at http://www.pict-pcti.org/research/legal_issues.html.

[203] Charney, J.I., 'The Impact of International Legal System on the World of International Courts and Tribunals', *International Law and Politics* , volume 31, 697 at page 699. [emphasis added].

The grouping of international criminal courts, of which the hybrid courts are one of the most interesting novelties, nevertheless, specialise in similar subject matter. Despite not having an effective hierarchical system, that would produce definitive answers to questions arising with respect to normative, procedural, and evidentiary differences, they might nevertheless contributed collectively to ideas that might be incorporated into general international law.

> *Ultimately one would expect that the best ideas will be adopted widely, contributing to the body of international law*[204]

CONCLUSION

However, at the end of the day, coherence and uniformity , are attributes of a legal system that is procedurally fair and therefore moral authoritative. While diversity, experimentation, and competition between legal traditions are valuable, they also significantly threatens the legitimacy of international criminal law courts. Without a common understanding of what constitutes due process, impartiality, judicial independence, the roles of the parties and the parameters of the evidence admissible we can not know the ground rules.

Similarly, it is imperative that we not only know the ground rules, but also the minimum guarantees, below which the trial process is deemed to be acting outside its moral authority. To this end, a common understanding of what constitutes the basic human rights standards afforded an accused – ie; in terms of investigation, interrogation, trial process, and the right to appeal, is required. In deed it would be preferable if these standards were non derogable.

Since Nuremberg, the international community has struggled with a common agreement as to where the balance lies between *truth* and *fairness* in the criminal trial. This has however resulted from a battle between legal traditions for acceptance of their separate view of the theory underlying a criminal trial and the procedural and evidentiary guarantees that flow as a consequence.

If we see both these components at polar ends of a continuum, then we might map the major legal traditions at opposing points along a linear progression. The civil law trial tips the balance in favour of objectifiable truth, which can be investigated and discovered, without undue concern for rules that limit truth-seeking. To this end the judge is neither prevented from calling and questioning witnesses widely, nor his/her conduct of investigation hampered by technical pre-emptive prescription. Conversely, the axis point

[204] Charney, J.I., 'The Impact of International Legal System on the World of International Courts and Tribunals', *International Law and Politics* , volume 31, 697 at page 700.

for common law favours the trial objective of; truth qualified by prescriptive rules of fairness. This trial theory stems from the 'liberal' notion that there are many truths, and that a common understanding of events will arise out of a dialectic that offers a fair hearing to both parties. The role of the judge is to adjudicate the process, in the recognition that the quality of truth is dependant upon the equality of the contest and the resources of the parties.

The balance to be struck falls somewhere between the object of the criminal trial as 'the ascertainment of truth'[205] and the trial objective to 'find out the truth and to do justice according to the law'[206]

If there is to be uniformity within the jurisdiction and across international criminal trials, it is crucial that judges and practitioners alike are working from a common trial theory. Since no domestic interpretation can have priority, and no legal tradition can have pre-eminence, a sui generis or new trial theory is necessitated. An agreed trial purpose will be important, if international criminal law is to be seen as universal and ethical.

[205] As per Lord Maugham *" I think it will be conceded by all, that the object of the trial is the ascertainment of truth"* FC Maugham "Observation on the Law of Evidence with Special Reference to Documentary Evidence" (1939) 17 *Can Bar Rev* 469.
[206] As per Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 at 63.