THE INTERACTION OF LEGAL SYSTEMS IN THE
WORK OF THE INTERNATIONAL CRIMINAL
TRIBUNAL FOR THE FORMER YUGOSLAVIA

H.E. Judge Patrick Robinson*

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I. ADDRESS

The International Criminal Tribunal for the Former Yugoslavia
(Tribunal) where I work is a court with a mandate to try individuals for the
most serious violations of international humanitarian law committed during
the conflict that engulfed Yugoslavia in the 1990s. It is an international
court established in 1993 by the United Nations Security Council (Security
Council). It consists of sixteen permanent Judges elected by the United
Nations (UN). In addition, to deal with the heavy caseload of the Tribunal,
a system was established in 2000 whereby ad litem judges are appointed
by the UN Secretary-General at the request of the President of the Tribunal to
sit on one or more specific trials. Under the Statute, the maximum number
of ad litem judges serving at any one time is twelve. However, a temporary
increase to a maximum of sixteen was approved by the Security Council
until February 28, 2009, to enable the Tribunal to conduct and complete
additional trials as soon as possible. There are three Trial Chambers,
organized in benches of three Judges and an Appeals Chamber of seven
Judges.

The Tribunal was never intended to be a permanent body, and in 2003,
the Security Council set a Completion Strategy for completing
investigations by the end of 2004, all trial activities by the end of 2008, and
all of its work by the end of 2010. The Security Council mandated that the
Tribunal concentrate on the prosecution and trial of the most senior leaders
suspected of being responsible for crimes within the Tribunal’s jurisdiction,
and transfer to competent national jurisdictions cases involving those who
do not have that level of responsibility. To date, the Tribunal has
concluded proceedings against 116 accused persons, convicted fifty-seven,
and acquitted ten others. Seven trials are currently being conducted daily.

* Address by H.E. Judge Patrick Robinson, President of the International Criminal Tribunal
for the Former Yugoslavia at the Nova Southeastern University, Davie, Florida, USA.
There are thirty-nine accused persons in detention, six cases at the pre-trial stage, two accused persons still at large—Ratko Mladić and Goran Hadžić—and thirteen accused have been transferred to domestic jurisdictions. It does not appear that the Tribunal will complete all the cases on its docket before 2011. The Security Council has already implicitly modified the Completion Strategy by a resolution adopted in 2008, providing that the terms of office of permanent Judges of the Appeals Chamber be extended until December 31, 2010 and that the terms of office of permanent and ad litem Judges of the Trial Chambers be extended until December 31, 2009.

Today, I will not be speaking about substantive law issues pertaining to genocide, crimes against humanity, and war crimes—the core business of the Tribunal. Instead, I will speak about another aspect of the Tribunal’s work, one that caught my attention from the very first week of work there, and, as you will see, one that still has me in its grasp: the interaction of legal systems in the work of the Tribunal. Expeditiousness is a key component of the right of an accused to a fair trial. On this very issue, the Tribunal had been criticised by the international community for the slow pace of its trials and is constantly challenged by the demands of the Completion Strategy. Trials at the Tribunal last from six months to four years. Very often comparisons are made to the Nuremberg Trials after World War II. But there, the bulk of the evidence was documentary. On the contrary, at the Tribunal most of the evidence is collected from hundreds of witnesses who can testify about the alleged mass crimes. For instance, in the Milošević case, the Prosecution sought to call over 1000 witnesses. At trial, 352 prosecution witnesses were ultimately called. Fifty-two defence witnesses were also called. The main challenge the Tribunal has faced in its groundbreaking work is to devise mechanisms that expedite its proceedings without prejudicing the rights of the accused.

As a court ruling on individual criminal responsibility, the most important principle that the Tribunal must respect is the right of an accused person to a fair trial. It is to be found in Article 14 of the International Covenant on Civil and Political Rights, and all the major regional human rights instruments.

3. See Letter from President of Int’l Crim. Tribunal for the Former Yugo. to President of U.N. Security Council ¶2 (Nov. 21, 2008), U.N. Doc. S/2008/729 (Nov. 24, 2008) (“However, while all efforts are being made to complete all trials as quickly and efficiently as possible, it now appears overly optimistic to claim that all appeals can be concluded during 2011, and it is likely that a small number will spill over to 2012.”).


rights instruments, including the European Convention on Human Rights and the African Charter on Human and Peoples Rights. The principle is so well established that it has long passed into customary international law, and may even be said to have attained the status of jus cogens.

The two main legal systems are the common law adversarial and the civil law inquisitorial systems. The first is followed by the United Kingdom, Commonwealth countries, and the United States. The latter is largely followed in the European continent. The civil law system can be traced back to Roman law in medieval Europe when criminal prosecution was performed by a unique public agent, acting as both Prosecutor and Judge.

The main difference between the two is that while the adversarial system is driven by the parties, the inquisitorial is driven by the Judge. The Judge in the civil law system is required to be far more active than his counterpart in the common law system. He is actively involved in the collection of evidence, and indeed, has at his disposal an "information rich dossier" of all the evidence. His counterpart in the common law system, where the collection of evidence is the province of the parties, i.e., the Prosecutor and the Defence, is not as involved in this process. It is important to stress that these are general descriptions, and that there are variations from the norm in both systems. As one commentator has put it, "as a system adds, superimposes or eliminates certain features, one can only say it reflects a 'dominant model.'" But this is not a talk on comparative law. My purpose is to highlight some of the ways in which the two systems interact with each other in the work of the Tribunal, particularly in matters of procedure and evidence, with a focus on measures adopted to expedite proceedings.

The first observation to be made is that, unlike the position in most common law countries, there is no jury at the Tribunal and, consequently, the Judges are both triers of fact and law. This feature is more akin to the situation in civil law countries. It is also significant that each Trial

Chamber consists of three judges ruling on the issues before them.\textsuperscript{10} The framers of the Tribunal's Statute undoubtedly felt that the gravity of the alleged crimes, the severity of the maximum sentence of life imprisonment, and the international significance of the trials warranted consideration and determination of the charges by more than one judge.

Generally, the collection and presentation of evidence at the Tribunal follows the common law adversarial system; an independent prosecutor is responsible for the investigation and prosecution of crimes,\textsuperscript{11} and also presenting evidence in a sequence of examination in chief, cross-examination, and re-examination.\textsuperscript{12} Set against the Prosecutor is the Accused (represented by counsel if he has not elected to exercise his qualified right to represent himself as set out in Article 21(4)(d) of the Statute and confirmed by the Appeals Chamber).\textsuperscript{13} We have already seen that fact finding and the presentation of evidence in the civil law system are predominantly in the hands of the Judge. At the Tribunal, these functions are predominantly in the hands of the parties.

Admissibility of evidence at the Tribunal is based on the more relaxed civil law model, in which there are professional judges as the arbiters of law and fact. Indeed, pursuant to Rule 89(C) of the Tribunal's Rules, evidence is admissible as long as it is relevant and has probative value. Thus, hearsay evidence is admissible. Generally, that is not the case in the common law adversarial system. There is less need for the hearsay rule in a system where there are professional judges able to assess and weigh the evidence. In common law countries where there are lay juries in criminal trials as triers of fact, there is a greater need for a rule limiting the use of hearsay evidence. At the Tribunal, as in the civil law system, we admit

\textsuperscript{10} The principle of collegiality was reaffirmed in a recent decision of the Appeals Chamber of the Tribunal. See Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, ¶ 27 (Jan. 12, 2009) ("The Appeals Chamber recalls that decisions and judgements are issued by a Trial Chamber as the body authorized to do so. In accordance with Article 23(2) of the Statute and Rule 87(A) of the Rules, judgements, and by logical implication other decisions, are rendered by a majority of the Judges assigned to a case. This has been the consistent practice of the Tribunal . . . . Whenever a Chamber renders a decision in accordance with the Statute, the decision is that of the Chamber and not merely a bundle of opinions of individual judges.").

\textsuperscript{11} Statute of the ICTY, supra note 7, at art. 16(1).


\textsuperscript{13} Prosecutor v. Šešelj, Case No. IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, ¶ 26 (Dec. 8, 2006); Prosecutor v. Krajinski, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-Represent, on Counsel's Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, ¶ 13 (May 11, 2007).
evidence if it is relevant and has probative value, and then determine, in
light of the totality of the evidence at the end of trial, what weight to attach
to this evidence. The approach to the admission of evidence is
inclusionary, not exclusionary, as it tends to be in the common law system.

Several procedures drawn from the civil law inquisitorial system have
been introduced in trials at the Tribunal for the purpose of expediting
proceedings. Generally, evidence in the form of written statements is not
used in the common law adversarial system, which has a distinct preference
for the orality of evidence in criminal cases, with the Accused or the
Prosecution having the right to cross-examine a witness of the other party.
The influence of the common law preference for the orality of evidence,
expressed in the Rules prior to 2001, has since been neutralized by
subsequent amendments authorizing the admission of written evidence and
gradually broadening the scope of the relevant rules. The Tribunal has
adopted this procedure to expedite trials, which include witnesses ranging
in number from 100 to 400. While the practice is not unknown in the
common law system, it remains exceptional. Examples from the common
law system will be given later.

As a general rule, pursuant to Rule 89(F), a Chamber may receive the
evidence of a witness in written form if it is in the interests of justice to do
so. But the most significant, specific measure for the reception of written
evidence is one that was introduced in 2000 in Rule 92bis. It is the
procedure whereby evidence is given in written form in lieu of oral
testimony—whether it be in the form of witness statements or transcripts of
previous testimony—so long as the evidence goes to proof of a matter other
than the acts and conduct of the Accused as charged in the indictment.
This requires an explanation. In most of the trials before the Tribunal,
certainly those in which political or military leaders are charged, the alleged

14. See, e.g., Rules of Procedure and Evidence of the ICTY, supra note 12, at Rule 92bis,
92ter, & 92quater.

15. Rules of Procedure and Evidence of the ICTY, supra note 12, at Rule 89(F) (“A Chamber
may receive the evidence of a witness orally or, where the interests of justice allow, in written form.”) In
2003, the Appeals Chamber held that written statements could be admitted under Rule 89(F) if the
witness (i) is present in court; (ii) is available for cross-examination and any questioning by the Judges;
and (iii) attests that the statement accurately reflects his or her declaration.); see also Prosecutor v.
Milošević, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of
Evidence-in-Chief in the Form of Written Statements, Disposition (Sept. 20, 2003) [hereinafter
Milošević Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief].

16. See Rules of Procedure and Evidence of the ICTY, supra note 12, at Rule 92bis(A); see
also Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on
Admissibility of Evidence in Chief in the Form of Written Statements (Majority Decision given 30
September 2003), ¶ 17 (Oct. 21, 2003).
crimes have not been committed by the Accused “personally physically” but by others (e.g. soldiers, paramilitaries, etc) under the Accused’s control, or as part of a joint criminal enterprise. Much of the prosecution case in Tribunal trials is concerned with adducing this so-called “crime base” evidence. So long as the evidence is of that kind, it may be introduced in written form (statement or transcript of a previous testimony). Of course, in order to prove its case, the Prosecution will also have to present other evidence linking the Accused directly to the crimes; usually this comes from “insiders,” that is, witnesses close to the Accused and who may have knowledge of his role in the crimes charged.

The admission of transcript of previous testimony achieves expeditiousness in the following situation: in 1999, Accused A is tried for war crimes; among the witnesses at the trial are B, C, and D. In 2001, Accused E is tried for war crimes; among the witnesses at the trial are B, C, and D who have testified at A’s trial on the same set of events. Since the evidence to be given in E’s trial is the same as that adduced at A’s trial, the transcript of the evidence from that trial is admitted in E’s trial, if it does not relate to the acts and conduct of the Accused.

The admission of written evidence is one thing, but what if a party wishes to cross-examine the witness? Here again, the Tribunal has been very much influenced by the civil law system in which the Judge, who is required to discover the truth, is very active. In the common law system a party will determine whether it wishes to cross-examine, with the Judge retaining the right to control the cross-examination by various means, including disallowing improper questions. At the Tribunal, so far as the procedure under Rule 92bis is concerned, the determination as to whether there is to be cross-examination on written evidence is made by the Trial Chamber. A party—and it is also important to bear in mind that the Defence can also use the procedure in presenting its case—will apply to a Trial Chamber for the admission of a written statement or a transcript of previous testimony. The Chamber grants the application if it is of the view that the evidence is “crime-base” evidence, that is, evidence in which, as I have explained, the Accused is not “physically personally” involved. No cross-examination is allowed for “crime-base” evidence. In some instances, while a written statement does not go to the acts and conduct of the Accused, it may touch upon a live and critical issue of the case which would warrant cross-examination. For example, in superior responsibility cases where a written statement touches upon the acts of subordinates of the Accused, the statement may generally be admitted under Rule 92bis as it

17. Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), ¶ 10 (June 7, 2002).
Robinson does not pertain, strictly speaking, to the acts and conduct of the Accused. However, because this issue is so proximate to the Accused’s responsibility, and is a live and critical issue of the case, the Trial Chamber will decide that cross-examination of the maker of the statement is necessary.  

Practitioners in the United States will immediately see the difference with their system; it is the Judge, not the party, who determines whether cross-examination takes place. Note the interaction between the systems; although the Tribunal’s trial process is at base common law adversarial—with the Prosecution and Defence—we use the civil law procedure of written statements and it is the Judge who determines whether there is cross-examination.

In 2006, Rule 92ter was introduced in the Rules, codifying the jurisprudential interpretation given to the admission of written evidence pursuant to the general Rule 89(F). Under this Rule, evidence which goes to proof of the acts and conduct of the accused may be admitted in written form under the following conditions: 1) the witness is present in court; 2) the witness is available for cross-examination and any questioning by the judges; and 3) the witness attests that the written evidence accurately reflects that witness’s declaration and what the witness would say if examined.  

Another example of the extent to which the admission of written evidence has been expanded by the September 2006 amendments is the introduction of Rule 92quater (replacing the former Rule 92bis(C)). Rule 92quater(A) allows for the admission of written evidence (statement or transcript of previous testimony) of a person who has subsequently died, or who can no longer with reasonable diligence be traced, or who is physically or mentally unable to testify. While Rule 92quater states that the fact that the evidence goes to proof of acts and conduct of an accused may be a factor against the admission of such evidence, such admission is not
specifically prohibited. Although common law jurisdictions have a distinct preference for live testimony, some do have procedures allowing written statements in circumstances similar to Rule 92quater. The United Kingdom has such a procedure and in 1997, Jamaica amended its Evidence Act to do very much the same, although I suspect that for Jamaica, what was important was the provision allowing written statements where the maker is kept away from court proceedings by threats of bodily harm.

These are all examples of civil law inspired procedures that have been introduced for the purpose of expediting proceedings. Where there is no cross-examination (use of Rule 92bis), the time saved is the time that would have been used for examination-in-chief and cross-examination. Where there is cross-examination (use of Rule 92ter), the time saved is the time that would have been used for examination-in-chief. Global time saved is not always readily noticeable because, even when there is no examination-in-chief, the party calling the witness is allowed to ask certain basic questions and to introduce documents.

Apart from the civil law inspired procedures we have discussed today, there exists a procedure stemming from the common law system. That procedure is judicial notice. At the Tribunal, judicial notice is divided into: judicial notice of facts of common knowledge not subject to reasonable dispute, and judicial notice of adjudicated facts or documentary evidence from other proceedings at the Tribunal, as set out in Rule 94.

On a general level, judicial notice is a time-saving mechanism meant to avoid stating the obvious during trial. Indeed, under Rule 201 of the U.S. Federal Rules of Evidence, judicial notice may be taken of facts not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. This definition under U.S. law is more akin to the “judicial notice of facts of common knowledge” under Rule 94(A) of the Tribunal’s Rules and is to be found in many other common law jurisdictions. Examples of facts which have been judicially noticed in common law

23. See Evidence Act, 2003, § 31 (Jam.).
25. FED. R. EVID. 201.
jurisdictions are: “Christmas is celebrated on 25 December;” standards of weight and measures; and difference of time in places east and west of Greenwich. Both at the Tribunal and at the International Criminal Tribunal for Rwanda, Trial Chambers have the obligation to take judicial notice of facts of common knowledge beyond reasonable dispute. Originally, the Rule only contained what is currently included in Rule 94(A), namely “facts of common knowledge.”

The more controversial procedure of judicial notice of adjudicated facts was added in 1998. The notion of “adjudicated facts” covers situations where a Trial Chamber makes a certain factual finding (for instance, “Bosnia and Herzegovina was the most multiethnic of all the Republics of the former Yugoslavia, with a pre-war population of 44 percent Muslims, 31 percent Serbs, and 17 percent Croats”) which is either unchallenged on appeal or confirmed by the Appeals Chamber. That fact thus becomes “adjudicated.” A second Trial Chamber may then subsequently “admit” that fact in its ongoing proceedings provided certain conditions are met. These are:

1) The fact must have some relevance to an issue in the current proceedings;
2) The fact must be distinct, concrete and identifiable;
3) The fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgment;
4) The fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion;

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29. See Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, ¶¶ 25, 28–29, 31, 35–36 (June 16, 2006) (holding that Trial Chambers must take judicial notice of the following facts: i) the existence of Hutus, Tutsis, and Twas as protected groups falling under the Genocide Convention; ii) the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification; and iii) the existence of Genocide against Tutsis in Rwanda between April 6, 1994 and July 17, 1994).
5) The fact must be identified with adequate precision by the moving party;
6) The fact must not contain characteristics of an essentially legal nature;
7) The fact must not be based on an agreement between the parties of the original proceedings;
8) The fact must not relate to the acts, conduct or mental state of the accused; and
9) The fact must clearly not be subject to pending appeal or review.\textsuperscript{31}

Since, by virtue of this procedure, facts adjudicated in a previous case may be admitted in an ongoing trial, the trial process is thereby expedited. The Prosecution does not have to lead evidence to establish that fact. Once the fact has been admitted, the burden of contesting it shifts to the Accused, creating a "rebuttable presumption." This shift has given rise to much debate as to whether there is a breach of the principle that the burden of proof is on the Prosecution.

Since the 1998 amendments, Chambers have used the Rule 94(B) provision relating to "facts" in practically all cases before the Tribunal (hundreds of "adjudicated facts" may be judicially noticed at once, therefore expediting the presentation of "crime-base" evidence). However, Rule 94(A) has been used sparingly.\textsuperscript{32}

Another example of the interaction of the two systems is the approach the Tribunal has taken in respect to witnesses. Several elements which reflect a predominantly civil law influence have been introduced into the regime for witnesses. In the common law adversarial, party-driven system a witness is generally seen as the witness for a party, either the Prosecution or Defence (you will no doubt recall the famous movie starring Charles Laughton, "Witness for the Prosecution"). This is not the case in the civil law, inquisitorial, judge-driven system. A witness is a witness for the Court, not for a party. It should be noted, however, that even in the common law system, the term "witness for the prosecution" or "the defence" does not mean that a party owns his witness, and many countries in that system have rules allowing one party to approach a witness of the other party. The case law of the Tribunal is that a witness is not the property of a party; one party may request an interview with a witness of

\textsuperscript{31} \textit{Id.} at ¶\textsuperscript{5} 5–14.

the other party in preparation for trial, and if that witness is unwilling to be interviewed, a subpoena may be issued to compel him to do so.\textsuperscript{33}

Similarly, in common law jurisdictions, a party may not cross-examine its own witnesses, unless the witness is hostile, \textit{i.e.}, not prepared to tell the truth. Of course, the issue of a party discrediting his own witness does not arise in the civil law system, where witnesses are called and questioned under the authority of the Court, which has available to it any previous inconsistent statement of the witness. Although there is not an extensive body of case law at the Tribunal on this question, what there is confirms the common law practice that allows a party to cross-examine his own witness, when that witness is hostile. However, the case law of the Tribunal has diverged from the common law in one important respect that provides a classic illustration of the interaction between the two legal systems.

In common law jurisdictions, generally, the contents of the previous statement are only received for the purpose of challenging the credibility of the hostile witness, and are only received as evidence of the truth of its contents if the witness changes his position and adopts the previous statement. One Trial Chamber held that the exclusionary rule was not applicable at the Tribunal, since the Rules of the Tribunal permit the admission of any evidence, including hearsay, provided it is relevant and has probative value. Therefore, a statement of a witness declared to be hostile may be admitted both for the truth of its contents and to challenge the credibility of the said witness, even in cases where the witness has not confirmed the contents of his statement before the Chamber. That Trial Chamber admitted video-recordings with transcripts of the interviews of witnesses found to be hostile.\textsuperscript{34} The Appeals Chamber has confirmed this approach.\textsuperscript{35} It is interesting to note that the common law procedure for the treatment of a hostile witness has been introduced into the Tribunal’s legal system, but in response to the requirement that such a procedure must be interpreted and applied in the light of the Statute and the Rules, it was

\textsuperscript{33} Prosecutor v. Mrksić et al., Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, ¶ 13–15 (July 30, 2003) (“Witnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them.”); Prosecutor v. Halilović, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, ¶ 15 (June 21, 2004). \textit{But see} Prosecutor v. Halilović, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, ¶ 4, Judge Weinberg de Roca’s dissenting opinion (June 21, 2004) (“Particular caution is needed where the Prosecutor is seeking to interview a witness who has declined to be interviewed.”).

\textsuperscript{34} Prosecutor v. Limaj et al., Case No. IT-03-66-T, Decision on the Prosecution’s Motion to Admit Prior Statements as Substantive Evidence, ¶ 4–5, 25, 34 (April 25, 2005).

\textsuperscript{35} See Prosecutor v. Popović et al., Case No. IT-05-88-AR73.3, Decision on Appeals against Decision on Impeachment of a Party’s Own Witness, ¶ 31–32 (Feb. 1, 2008) [hereinafter \textit{Popović Decision on Appeals against Decision on Impeachment}].
stripped of one of its features—that the previous inconsistent statement of a hostile witness is not admissible as substantive evidence.

Another example of the interaction of the legal systems in the Tribunal's functioning is Rule 98 which allows a Trial Chamber to call witnesses, which is usually done after the parties have completed the presentation of their evidence. Generally, in common law jurisdictions, a judge has no power to call witnesses; that is the province of the parties. This incapacity is not a feature of civil law jurisdictions, where the "active" judge has a dossier of the evidence and, based on the witness list of the parties, determines who is to be called as witnesses.

The Tribunal has followed the civil law system in this area by empowering a Trial Chamber to call witnesses. This power has proved to be very useful, particularly in two sets of circumstances:

1) In cases where neither the Prosecution nor the Defence wishes to call a particular witness whose testimony the Trial Chamber may deem fundamental for the establishment of the truth; and

2) In cases where a particular witness, not wishing to be identified with either the Prosecution or the Defence, may only be prepared to testify if called by the Trial Chamber.

The last example of interaction I wish to give relates to the procedure that, in the United Kingdom and other Commonwealth countries, is called "No Case to Answer." At the end of the Prosecution's case, a submission is made by the Defence that there is no case to answer and that, therefore, the charges against the Accused should be dismissed. This procedure is reflected in Rule 98bis, which provides that a Trial Chamber shall, at the end of the Prosecution's case, "enter a judgement on acquittal on any count if there is no evidence capable of supporting a conviction."

The main purpose of the "No Case to Answer" procedure in common law jurisdictions is to prevent juries bringing in an unjust conviction on the basis of evidence that cannot lawfully support a conviction. Since there are, at the Tribunal, professional judges of both law and fact, and no jury, it may be questioned whether the procedure is really necessary. It is reasonable to assume that the Tribunal's professional judges will be able to do what the lay jury may not, that is, assess evidence to determine what items could lawfully sustain a conviction.

36. Rules of Procedure and Evidence of the ICTY, supra note 12, at Rule 85(A) (allowing a Trial Chamber, in the interests of justice, to change the sequence in which the evidence is presented and thus to call its witnesses at any time during the proceedings). See Popović Decision on Appeals against Decision on Impeachment, supra note 35, at ¶ 26.
It is interesting to note that the International Criminal Court does not have a corresponding procedure in its Rules. However, the possibility presented by the procedure for an early acquittal of the Accused, thereby achieving expeditiousness, is a strong argument for its retention. In some instances, accused have been acquitted on a number of counts, or charges, at the Rule 98bis stage, thereby drastically reducing the scope of the indictment and potentially the length of time necessary for an accused person to present his defence. Of course, the Rule also protects the fair trial rights of the Accused, since he should not be called upon to answer to charges in respect of which there is no evidence capable of supporting a conviction.

The last “time-saving” mechanism that I wish to share with you is provided for in Rule 73bis(D), and concerns the power of a Trial Chamber to focus on the issues in respect to which evidence will be presented at trial, and to invite the Prosecutor to reduce the scope of the indictment. In the event that the Prosecution fails to respond positively to the invitation, the Trial Chamber may reduce the charges in the indictment itself, having regard to all the relevant circumstances but so that the charges are “reasonably representative of the crimes charged.” Since its inception, this Rule has been regularly used by Trial Chambers and has greatly assisted in expediting trials. As a matter of practice, Trial Chambers have reduced the scope of indictments by a third.

II. CONCLUSIONS

The main contribution of the Tribunal to international criminal law is the body of procedural and evidentiary rules it has developed as the first international criminal tribunal since Nuremberg. The rules thus established have been serving as a template for other international criminal tribunals and some countries have even expressed an interest in adopting them for their domestic courts.

The fair trial rights set out in the International Covenant on Civil and Political Rights reflect customary international law, and therefore, apply to all countries, irrespective of whether they are parties to that treaty; those rights make no distinction between countries that follow the common law adversarial system and those that follow the civil law inquisitorial system.

37. Prior to its amendment in 2004, Rule 98bis provided that a judgment of acquittal should be entered if there is evidence insufficient to sustain a conviction on one or more charges.

38. Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Decision on Application of Rule 73bis, ¶ 5 (July 11, 2006); Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on the Application of Rule 73bis, ¶¶ 9–12 (Nov. 6, 2008).
Both sets of countries would argue that their system achieves a fair trial. But it is clear that each arrives at the goal by a different route.

The system the Tribunal has produced is not merely an amalgamation of both, but one which is *sui generis*. Ultimately, the system that is evolving at the Tribunal is neither party-driven nor judge-driven; it is fairness-driven. This does not mean it is perfect. I have criticised it on occasions. As I have said previously, conflicts between the two systems must be resolved “using the principle of fairness as the plane to smooth the edges in the alignment of the legal systems.”