Hanna Kuczyńska

The Accusation Model Before the International Criminal Court

Study of Convergence of Criminal Justice Systems

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Hanna Kuczyńska
Institute of Law Studies
Polish Academy of Sciences
Warsaw
Poland

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Preface

This monograph examines the accusation model used before the International Criminal Court (hereinafter: ICC) from a comparative point of view.[1] It highlights elements of the accusation model used in four different countries and before the *ad hoc* tribunals and the ICC and explains why a certain structure of prosecution has been used before the ICC. The study addresses questions on the main differences between the continental law and common law judicial traditions and on how changing one of the institutions of criminal procedure influences the remaining institutions. It examines how the functioning of the International Criminal Court has become a forum of convergence of procedural solutions known in these legal traditions. Four countries were selected as primary examples of these two legal traditions: the United States, England and Wales, Germany and Poland.

The first layer of analysis focuses on selected elements of the model of accusation that are crucial to the model adopted by the ICC. These are development of the notion of the ICC Prosecutor's independence in view of their ties to the States Parties and the Security Council, the nature and limits of the Prosecutor's discretional powers to initiate proceedings before the ICC, the reasons behind the prosecutor's choice of both defendants and charges, the role he plays in the procedure of disclosure of evidence and consensual termination of proceedings and the determinants of the model of accusation used during trial and appeal proceedings.

The second layer of the book consists in an analysis of the motives behind applying particular solutions to create the model of accusation before the ICC. It also shows how the model of accusation gradually evolved in proceedings before the military and *ad hoc* tribunals: ICTY and ICTR. Moreover, the question of compatibility of procedural institutions is addressed: in what ways does adopting a certain element of criminal procedure, e.g. discretional powers of the prosecutor

[1] The research project was financed from the funds of the National Centre of Science (Narodowe Centrum Nauki) on the basis of a decision No. DEC-2012/05/B/HS5/00653.

to initiate criminal proceedings, influence the remaining procedural elements, e.g. the existence of the *dossier* of a case or the powers of a judge to modify the legal characterisation of facts appearing in the indictment? Moreover, it should be borne in mind that both the specific powers and the practical role of prosecutors in any legal order depend not only on the legal and the criminal law systems in place but also on historical circumstances and historical development of the law, the cultural and legal impact of other countries, as well as the existing culture of which the legal culture is only a small part.

Warsaw, Poland Hanna Kuczyńska

List of Abbreviations

§	Paragraph
CC	The polish Criminal Code
CCP	The Polish Code of Criminal Proceedings
CPIA	Criminal Procedure and Investigation Act 1996.
CPS	Crown Prosecution Service
DPP	Director of Public Prosecutions
Dz.U.	Dziennik Ustaw (the Polish Journal of Laws)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
NGO	Non-governmental organisation
OTP	Office of the Prosecutor
OTP ICC	Office of the Prosecutor of the International Criminal Court
OTP ICTY	Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia
RPE	Rules of Procedure and Evidence
RPE ICC	Rules of Procedure and Evidence of the International Criminal Court
RPE ICTR	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
RPE ICTY	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
SC	Security Council
SN	Sąd Najwyższy (the Polish Supreme Court)
StGB	Strafgesetzbuch
StPO	Strafprocessordnung

TK	Trybunał Konstytucyjny (the Polish Constitutional Tribunal)
UN	United Nations
UN SC	United Nations Security Council
US	United States

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Chapter 1
The Procedure Before International Criminal Tribunals

Abstract This chapter shows an outline of the process in which the accusation model before the ICC was created as the result of a discussion between representatives of the continental and the common law systems. This discussion was aimed at finding how to build a criminal procedure model that would meet the major objectives set by the ICC, taking advantage of the experiences of various legal systems in order to prevent the impunity of perpetrators of the most severe crimes of international significance, simultaneously ensuring compensation for victims of crimes and a fair trial for the accused. This discussion started with the creation of the first international criminal tribunals and the adoption of the first set of procedural rules for the operation of international criminal (military) tribunals: in Nuremberg and Tokyo, and continued during the operation of the ad hoc tribunals. The finally adopted accusation model before the ICC is presented by using a set of basic components that were selected on the basis of the fact that they cover the framework of the entire course of proceedings before the ICC, and they are regulated in both the common law and the continental law systems in a manner that is both distinct and different. They were also selected in a way that demonstrates to the fullest extent why certain solutions are consistent with the common law approach while others are based on the continental tradition.

1.1 Preliminary Issues of Convergence of Criminal Justice Systems

The international procedural criminal law governs the role and powers of a prosecutor who is an accuser before international criminal tribunals in a manner that is a *sui generis* solution when compared to national legal orders. Through the adoption of criminal procedure components derived from various legal systems and traditions, a distinct model of accusation was established that was unrelated to the legal system of any one specific state. It is often presented as the result of a conflict between common law and civil law traditions, which is a paradigm used to explain

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the dynamics of international procedure.[1] Procedural institutions were selected in such a way as to facilitate the optimum administration of international justice. In consequence, criminal procedure before international criminal tribunals has become an amalgam of procedural institutions functioning in various states. It has become a forum for bringing closer and converging legal traditions introducing a new quality to the area of legal proceedings.

The literature on international criminal procedure often focuses on the analysis of procedural institutions in terms of their continental and common law background. Traditionally, the continental law systems (which in the Anglo-Saxon doctrine are known as civil law or inquisitorial (non-adversarial) systems and are considered to have been derived from Roman law and the impact of Napoleon's codes on Continental Europe) are juxtaposed with the common law systems (the law of the Anglo-Saxon states, also referred to as the adversarial system) based on the assumption that these are two distinct traditions. Such a dichotomy is purely a matter of convention. We could as well talk about Anglo-American and Roman-German legal orders,[2] confessional states (e.g., Islamic) and secular states,[3] North and South states[4] or common law and statutory law states. A division based on a larger number of systems may also be adopted, in which case we could discuss, for example, the states of the common law area, the civil law and *sui generis* states[5] or the systems of Christian, Islamic, Confucian and Buddhist states.[6] We could also rely on the approach that analyses the types of authority and justice and, in consequence, distinguishes between two models of justice systems: hierarchical and coordinated officialdom or policy-implementing and conflict-solving justice types of procedure. The main difference between these types is characterised by the presence (or absence) of a hierarchical structure of authority, a strict hierarchical ordering and technical standards for decision-making.[7] While all these features are characteristic for hierarchical officialdom, coordinated officialdom's distinctive features comprise the absence of specialised officials, as justice is performed by lay people, who belong to a "single echelon of authority". While the first type is associated with non-adversarial systems and the mode of procedure structures as an official inquiry, the second one responds to the adversarial mode of proceeding and takes its shape from a contest or a dispute.[8]

[1] See: Mégret (2009), p. 41.

[2] Which would explain the differentiation applied herein—Ambos (2009), p. 605. This dichotomy presented also by many more authors, e.g., Ambos (2007) p 429; Bohlander (2011) p 393; Knoops (2005) p 6-7; Kuczyńska (2014) p 3; Ohlin (2009) p 81; Orie (2002) p 1450; Safferling (2001) p 55; Schuon (2010) p 25; Tochilovsky (2001) p 627; Wiliński (2008) p 640; Wilhelmi (2004) p 7.

[3] Elewa Badar (2011), pp. 411–433.

[4] Van Sliedregt (2011).

[5] That may be exemplified by the Democratic Republic of China as in: Ambos (2000), p. 89; Damaška (1986), p. 3.

[6] Bassiouni (1993), p. 248.

[7] So-called *logical legalism*—Damaška (1986), p. 23.

[8] This approach was also adopted by A. Heinze. Using these two models of justice systems, this author analysed procedural solutions used before the ICC on the example of disclosure of evidence. Heinze (2014), p. 145.

Even the above-mentioned divisions are sometimes considered to be too simple to capture systemic solutions. The notions of common law (adversarial) tradition and continental (inquisitorial) tradition seem to be more like labels than strict divisions as they cover certain features in shifting combinations.[9] Much confusion is due to the fact that certain criteria remain uncertain for the inclusion of specific traits into a specific type of procedure.[10] It is not possible to use them in order to describe legal traditions in a dichotomous way, as the main features of these two model procedures are present in legal systems with both common law and continental traditions. The most characteristic features of these models are often equally well known as ill-defined, as it is "not at all clear which sets of features are determinative of the 'adversary' as opposed to the 'non-adversary' system".[11] In both continental and Anglo-Saxon scholarship, the expressions "adversary" and "inquisitorial" are used in a variety of senses and certain features of these types of proceeding are polarised to excess for better comparativist effect.

However, because differentiation between the common law and continental law traditions is a common point of reference in the majority of research studies on international criminal law, in both the areas of national and international criminal procedures, these concepts will be used here in a comparative analysis of international criminal procedure. The dichotomy was already in use in the twelfth century, and nowadays it came to be used by comparativists on a broader scale.[12] Although the dichotomy between these two legal traditions is actually disappearing, it is still the best point of reference and still constitutes a useful analytical device. This method will be adopted here, as the diversity of legal systems has to be somehow reduced to a "manageable set of patterns".[13] It will be assumed that the systems of criminal procedure in England, Wales and the United States of America belong to the common law tradition, whereas Poland and Germany represent continental legal systems. Comparative analysis on the basis of the defined legal systems is practical, as comparing "examples" of adversarial and inquisitorial systems enables to articulate concrete differences and concrete similarities between these systems and the ICC model of accusation and prevents analysing mere "patterns".[14]

It is noteworthy that there is no consistency in calling a given method of resolving legal and criminal issues a "system" (by using the phrase "the continental law system"). The following phrases are alternatively used: type of proceeding,[15] model,[16] method[17] and tradition[18] or legal families.[19] In the literature, the term

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[9] Damaška (1972–1973), p. 552.

[10] Damaška (1986), p. 4.

[11] *Ibidem*.

[12] *Ibidem*, p. 3.

[13] *Ibidem*, p. 3.

[14] As analysed by Damaška (1986), pp. 5 et seq.

[15] See: Damaška (1986), p. 23; Damaška (1974–1975), p. 481.

[16] Langbein and Wienreb (1978), p. 1551.

[17] Hauck (2008).

[18] Van Sliedregt (2011), p. 390; Heinze (2014), p. 105.

[19] As in: Bohlander (2014), p. 493; Campbell (2013), p. 156.

"common law system" occurs most frequently, although the use of the notion "legal traditions", rather than "legal systems", to describe legal orders seems to be more accurate. The notion "tradition" is defined as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the politics, about the proper organization and operation of a legal system, and about the way the law is or should be made, applied, studied, perfected and taught".[20] This notion seems to be the most appropriate in analysing procedural aspects of international criminal procedure. In turn, the concept of a "model" may be understood primarily as a "specimen" structure or procedure. The best definition of the term "model" in the theory of the criminal proceedings seems to be that of a "set of basic components of a system that allows differentiating it from other systems".[21] In this sense, this word will be used in the analysis of the accusation model presented in this monograph. The notion "model" is usually considered to be signifying a structure that is coherent and complete. Therefore, one could argue that the whole system of criminal procedure should be described to constitute a "model", as "accusation" is just one of the functions of this procedure and cannot be treated as a whole. However, we cannot save this notion solely for the needs of describing a whole system of criminal procedure. It is often observed that models can serve as "convenient shorthand to indicate generalities rather than specifics, and they must therefore be seen only as an aid to, and as a substitute for, understanding".[22] While analysing a certain component of criminal trial (or a function performed by one of the actors in trial), "modelling" becomes useful in order to explain and show why certain elements tend to have certain features. Notwithstanding the shortcomings of the "modelling", using a model description cannot be abandoned. Therefore, when speaking of the common law and continental "legal tradition", it will be assumed that a "system" of law can operate in one state only and a "model" of procedure (that is, a set of basic components) is not the same as system and tradition.

International criminal procedure is often referred to as "cultural and legal hybrid".[23] It was created as the result of a discussion between representatives of the continental and the common law systems. This discussion was aimed at finding how to build—from scratch—a criminal procedure that would meet the major objectives set by the ICC, taking advantage of the experiences of various legal systems in order to prevent the impunity of perpetrators of the most severe crimes of international significance, simultaneously ensuring compensation for the victims and a fair trial for the accused. This discussion started with the creation of the first international military tribunals and the adoption of the first set of procedural rules

[20] Cit. after: Merryman and Pérez-Perdomo (2007), p. 2.

[21] As defined by Waltoś (1968), p. 9.

[22] Cit. after: Heinze (2014), p. 114.

[23] This notion is used quite commonly, e.g.: Cryer et al. (2010), p. 427; Van Sliedregt (2011), p. 389; Boas et al. (2011), pp. 15–16.

for their operation: in Nuremberg and Tokyo. Usually, therefore, analysis of procedural models before the ICC starts with these.

1.2 Evolution of Procedure Before International Criminal Tribunals

1.2.1 International Military Tribunals: Establishing a Precedent

Regulation of the procedure before the International Military Tribunal (IMT) in Nuremberg was the first historical instance of establishing criminal procedure rules from scratch, independently of any national legal orders.[24] The proceedings were conducted pursuant to the IMT Charter, which constituted an attachment to the London Agreement of August 8th 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis. Its provisions were complemented by Rules of Procedure.[25] The provisions of the Charter and the Rules contain only an outline of solutions, leaving the resolution of ongoing procedural problems to judges and prosecutors. This model of procedure came to life, shaped by a variety of legal orders from the victorious countries, representing both the common law and the continental law systems. The states managed to achieve a compromise that resulted in, as we would call it today, convergence of legal traditions. Based on the continental tradition, it was decided that the trial would be led by a judge who would also issue a verdict, as the jury had not been introduced. *In absentia* trials were also allowed, and the accused had the right to provide explanations (they were not acting in the capacity of witnesses). In turn, a strictly adversarial trial framework was borrowed from the Anglo-Saxon system, in which the parties were to present the evidence and interrogate witnesses pursuant to the principles of cross-examination, composing the dialectic method of presentation of evidence.[26]

When a project of procedural rules for the Tribunal was presented by the American delegation, the representatives of France and the Soviet Union “shuddered”.[27] Differences between common law systems and continental law systems led to misunderstandings and long negotiations. The earliest disagreements that occurred between the representatives of the two legal traditions concerned the

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[24] International Military Tribunal for the Far East Charter (IMTFE Charter) of 19 January 1946: http://web.archive.org/web/19990222030537/http://www.yale.edu/lawweb/avalon/imtfech.htm. Accessed 8 Jan 2015.

[25] Adopted on 29 October 1945, at http://avalon.law.yale.edu/imt/imtrules.asp. Accessed 9 Sept 2014.

[26] But Cassese (2008), p. 384; Fairlie (2004), p. 245 otherwise.

[27] See: Ginsburg and Kudriavtsev (1990), pp. 67–31; Cyprian and Sawicki (1948), pp. 5–38; Gardocki (1985), pp. 22–33.

adoption of particular procedural institutions. There was a particular backlash against the use of a purely adversarial model before an international criminal tribunal, as it was considered to turn a criminal trial into a "mere contest of skills". Another problem occurred in relation to the limited content of the indictment and the related "classification" of incriminating evidence until the time of trial, which, according to representatives of continental systems, impaired the fairness of the trial. Even at that time, precedent-based procedure caused a lot of controversy—mainly due to the possibility of abuse of their broad prerogatives by judges and the unpredictability of the proceedings. Also, the suitability of adopting solutions characteristic of the purely adversarial model was generally challenged, as it was argued that neither the accused nor their defence counsels knew the system, which put them in an unfavourable position relative to the prosecutors, who came from a background of common law orders (two out of the four members of the Committee of Prosecutors).[28] Finally, however, it was decided that the use of an adversarial framework for the Nuremberg trials was "pragmatic".[29]

There is no doubt that the model employed in Nuremberg served as guidance for the further development of international criminal procedure. It was both "novel and experimental".[30] The model of criminal procedure that was finally adopted turned out to be unexpectedly effective, and the trials were completed within 10 months. They became a proof that it was possible to establish a *sui generis* criminal procedure model that would not duplicate the legal procedure of any of the states and that justice could be efficiently administered on an international forum, in this "most delicate kind of trial".[31] However, the political situation under which military tribunals operated was entirely different from the situation in which international criminal tribunals function today. Moreover, military tribunals were to adopt and apply "to the greatest possible extent expeditious and nontechnical procedure" (as in Article 19 of the Charter). As a result, the course of their operation was based mainly on decisions taken by judges in specific cases, as the charters of the tribunals were formulated in exceptionally general terms. It seems that the fact of establishing a precedent in the form of a tribunal issuing verdicts on the most serious international law crimes was, in itself, considered by the founders to be more important than establishing coherent and durable rules of procedure.[32]

[28] Kremens (2010), p. 34.

[29] As observes: Cassese (2008), pp. 377–378. It was also due to the United States' involvement, which became the "driving force" behind the Nuremberg trials—not least in economic terms—as in: Ambos and Beck (2012), p. 491.

[30] The opening speech by Justice Robert H. Jackson as reported in: Roche (2011), p. 139.

[31] Cit. after: May and Wierda (2002), p. 20.

[32] It also seems that the underlying criticism towards strictly adversarial solutions used on an international forum continues to be valid in relation to today's development of the procedure before international criminal tribunals.

1.2.2 ICTY and ICTR: "Living Laboratories"

The International Criminal Tribunal for the former Yugoslavia (ICTY)[33] and the International Criminal Tribunal for Rwanda (ICTR), established on the basis of Security Council Resolution,[34] are known as *ad hoc* tribunals—as their jurisdiction was restricted to a specific time and territorial framework. They were appointed by the Security Council as a means of restoring international peace and security pursuant to Chapter VII of the UN Charter.[35] They were the first two modern international criminal tribunals administering international justice pursuant to a dedicated, independent set of procedural rules. Until the moment of establishing the ICC, they were the basic forum for the development of international criminal procedure. The procedural framework of the *ad hoc* tribunals is set out in their Statutes: the ICTY and ICTR Statutes, which comprise, respectively, 32 and 34 articles. These documents are, however, general and schematic, and as such they had to be complemented with the Rules of Procedure and Evidence (RPE).[36] They constitute a specific source of procedural law. They were adopted by the judges of the Tribunal, who may also amend them at any time. The benefit of this solution is in achieving high flexibility of the rules. As a result of such development, the specific shape of procedural rules depends mainly on the resolutions of judges. This method of legislation raises two concerns. First, it allows the judges to play a dual role as a drafting organ and as an organ applying the rules—they act as *quasi*-legislators. In consequence, judges act both as entities establishing and interpreting the law. Second, it leaves the judges with almost unlimited discretion in framing the rules and principles of procedure—considering that the content of the Statue is the only limitation of their discretion and that this document is very laconic. On the other hand, flexibility of the Rules is an important asset in dealing with the many unprecedented situations and unpredicted legal issues confronting the tribunals; it makes it possible to adjust them to the ongoing tasks and demands of the tribunals.[37]

Before the *ad hoc* tribunals, international criminal procedure has been developed as a separate branch of law. In the frequently cited decision in the case of *Prosecutor v. Tadić*, the ICTY made a statement on the unique nature of the criminal procedure model adopted by this Tribunal:[38] "As a body unique in

[33] UN Doc. SC Rep. 808, of 22.2.1993.

[34] UN Doc. SC Rep. 955, of 8.11.1994.

[35] As it reads in Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of peace or act of aggression, and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

[36] Rules of Procedure and Evidence ICTY, version of 22.05.2013; Rules of Procedure and Evidence ICTR, version of 9.02.2010.

[37] In general, see: May and Wierda (2002), pp. 22–23; Bassiouni and Manikas (1996), pp. 199–225, 819–820.

[38] *Prosecutor v. Tadić*, IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, § 20–23.

international law, the International Tribunal has little precedent to guide it. The international criminal tribunals at Nuremberg and Tokyo both had only rudimentary rules of procedure. The rules of procedure at Nuremberg barely covered three and a half pages, with a total of 11 rules, and all procedural problems were resolved by individual decisions of the Tribunal. At Tokyo there were nine rules of procedure contained in its Charter and, again, all other matters were left to the case-by-case ruling of the Tribunal. (. . .) Another unique characteristic of the International Tribunal is its utilization of both common law and civil law aspects. Although the Statute adopts a largely common law approach to its proceedings, it deviates in several respects from the purely adversarial model (. . .) As such, the International Tribunal constitutes an innovative amalgam of these two systems" and "was able to mold its Rules and procedures to fit the task at hand". Thus, the model does not follow the principles of only one of these systems. It has been assumed that despite the fact that the procedural institutions known from specific legal systems were used, the interpretation of a given provision should not be automatically applied: "A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it sui generis".[39] Despite such systemic assumptions, it cannot be denied that in the initial period of operation of the ICTY and ICTR, the vision for the criminal procedure was derived from the common law tradition. This observation does not arise from the Statutes of these tribunals but from analysis of procedural solutions contained in the Rules of Procedure and Evidence, whose draft version was presented by the US delegation. It is claimed that judges received proposals regarding the model of procedure from a number of states and organisations, but the proposal that came from the United States was "by far most comprehensive and the one that proved to be particularly influential".[40] Moreover, the judges (unsurprisingly) were inclined to draw upon models of procedure that were the most readily available—the precedent of Nuremberg and Tokyo. The judges adjudicating in the initial period of the tribunals' functioning also came from these legal systems. It was admitted that "it was not a secondary factor that a slight majority of the judges who drafted the Rules came from common law countries".[41] The approach of both the creators of the procedure, as well as those who applied it, had a direct impact on the main characteristics of the procedure before the *ad hoc* tribunals and led to the conclusion that it was a model of mainly "adversarial inclination".[42]

[39] *Prosecutor v. Delalić*, IT-96-21, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, 1 May 1997, § 15.

[40] In similar words: Morris and Scharf (1995), p. 177. Also in: Bassiouni and Manikas (1996), p. 863; Schuon (2010), p. 196; Jackson and M'Boge (2013), p. 949.

[41] Cit. after: Langer (2005), p. 859.

[42] The majority of authors agree on that: Ambos (2003), p. 18; Bassiouni and Manikas (1996), p. 863; May and Wierda (2002), pp. 328–329; Mégret (2009), p. 43.

The experience of the *ad hoc* tribunals shows the pursuit of an accusation model that would be most compatible with the profile of international criminal tribunals. The proceedings before the ICTY and ICTR became a forum for testing the effectiveness of procedural institutions derived from various legal systems. These tribunals became a "living laboratory", examining the effectiveness of specific legal solutions in the environment of an international tribunal. Due to the flexibility of procedural rules, it was possible to seek solutions tailored to the specific tasks of the international criminal tribunal.

"The competition between the adversarial and inquisitorial systems in the early years of ICTY was a competition about which of these two techniques would better enable ICTY to achieve its goals. But it also was a competition between cultures".[43] Each of the components comprising the accusation model—the role of the prosecutor in a trial, his discretion in initiating an investigation, subjecting his right to bring the indictment before a court to judicial review, the prosecutor's obligation to disclose evidence to the accused, the possibility of a consensual termination of criminal proceedings and the prosecutor's tasks during the trial and the appeal proceedings—has become a field of conflict between two legal traditions during proceedings before the *ad hoc* tribunals. Each of these components has been altered and adapted in order to administer international justice, not always in a manner predicted—or even approved—by the tribunals' founders. These alterations were often made in the course of a specific case, which provided a background for the adoption of a new solution. When confronted with a specific procedural problem, the solutions applied by the tribunals' creators needed to be adapted, through proper judicial interpretation, to the requirements and rules of the international tribunal. Even the most basic principles of criminal procedure have been reviewed, as in the case of gradual departure from perceiving a prosecutor solely as an accuser in the criminal procedure and recognising him to be a "guardian of law" or as in the case of acknowledging the need for proactive participation by a judge in a trial and imposing on him an obligation to establish the material truth.

As their name suggests, the *ad hoc* tribunals are not universal authorities. They may be treated as experiments that, having succeeded, have made it possible to undertake work on a universal model of criminal procedure, adjusted to the needs of the tribunals prosecuting the most severe crimes under international law. The functioning of the ICTY and ICTR had the greatest impact on the accusation model adopted before the ICC.[44] The proceedings held before the ICC are based on the principles developed by the *ad hoc* tribunals, while taking into account their experiences, as well as amendments introduced in their jurisdiction. Some of the legal institutions used before the ICTY were transferred unchanged to the ICC, some were modified to a certain extent and the remaining ones were regulated in a completely different way.

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[43] Cit. after: Langer (2005), p. 848.

[44] *Inter alia*: Roberts (2001), p. 561; Kirsch (2005), p. 293.

As far as the model of accusation before the ICTR is concerned, it differs in some aspects from that adopted by the ICTY. Due to numerous similarities, the proceedings before this Tribunal will be presented only in cases when it has adopted solutions different from those of the ICTY, or such, that are particularly important for illustrating a specific trend or functioning of a specific procedural institution. The same approach—due to the growing volume of the manuscript—had to be adopted towards the rules of functioning of the IMTFE in Tokyo.

1.2.3 International Criminal Court: Normative Balance Between Two Traditions

The final stage in the development of international criminal procedure involves the establishment of a permanent tribunal, a universal authority of justice adjudicating in cases pertaining to the most serious crimes of international law. The Rome Statute of the International Criminal Court is an international agreement, adopted at a diplomatic conference in Rome on 7 July 1998. It became effective on 1 July 2002, having achieved the agreed threshold of 60 ratifications. As opposed to the *ad hoc* tribunals established by the Security Council pursuant to the UN mandate, the State Parties to the Rome Statute themselves agreed to execute and ratify the Statute. Establishing a permanent and—presumably—neutral court marked the next stage in the development of international justice, considering that international military tribunals had been established by the winners of the World War and the *ad hoc* tribunals—by forces that were external to the domestic conflicts taking place at a specific time and in a specific territory.

The criminal procedure before the ICC is based on the Rome Statute, which provides very detailed solutions for the majority of procedural issues (with 128 articles). Despite this level of detail, its provisions are also complemented by the Rules of Procedure and Evidence (RPE)[45] and Regulations of the Court.[46] Amendments to the Rules of Procedure and Evidence can enter into force only upon adoption by a two-thirds majority of the members of the Assembly of States Parties. The amendments can be proposed by each State Party, the ICC Prosecutor and the judges acting by an absolute majority. This amendment procedure makes them less flexible than the procedural rules before the *ad hoc* tribunals and prevents them from being modified in response to a specific demand.[47] Such a demand will definitely occur, as

[45] Rules of Procedure and Evidence, Preparatory Commission for the International Criminal Court, New York 2000, U.N. Doc PCNICC/2000/1/Add.1.

[46] Regulations of the Court, ICC-BD/01-03-11, Adopted by the judges of the Court on 26 May 2004, http://www.icc-cpi.int/NR/rdonlyres/50A6CD53-3E8A-4034-B5A9-8903CD9CDC79/0/RegulationsOfTheCourtEng.pdf. Accessed 11 Feb 2015. Altogether almost 700 provisions: Lee (2001), p. 548; Fernandez de Gurmendi and Friman (2009), pp. 797–824.

[47] Successfully, so far.

there is no way of foreseeing each procedural problem that may be faced by the ICC. The fact that their content is controlled by the states is intended to discourage potential amendments. The Regulations of the Court can, however, be amended by the judges acting by an absolute majority, which proves that there is always a tendency to use flexible rules established by judges as a basis for international criminal proceedings and to seek the efficiency of actions by ensuring flexibility of the applied regulations.[48]

A number of years were spent on developing detailed procedural solutions in the course of drafting the ICC Statute. Each time, they were a result of long-term negotiations and the outcome of the compromise between the representatives of states with various legal traditions. The ICC Statute was the first document that was not developed in a haphazard manner, with an intention to create procedural rules in the process of their application by means of transforming them by judges; the latter approach prevailed in the international military tribunals and *ad hoc* tribunals that were set up—as their name indicates—in response to a specific demand and only for a specific period of time. It was of paramount importance that the need to reach a consensus between the states signing the Rome Statute—between the delegations of about 120 states—played a major role in developing the accusation model before the ICC.[49] The establishment of the Court by means of the execution of an international agreement forced a compromise in the area of procedural solutions between its creators. In order to ensure adoption of the Statute, some of the most controversial issues were dropped and replaced by more neutral solutions: as in the case of "indictment", which was finally replaced by "charges".[50] Such method sometimes led to prejudicial effects on coherence and effectiveness of the procedural system of the ICC.

Finally, the criminal procedure before the ICC was developed in such a way as to respond optimally to the needs of the international criminal court. This manner, however, did not resemble any of the legal systems from which the specific institutional solutions were borrowed. Although a majority of institutions and mechanisms may be described as institutions and mechanisms derived from a specific legal system, they have become *sui generis* solutions due to their application and functioning before the international criminal tribunal. They are not dominated by one legal culture. Some stages of proceedings are conducted according to the Anglo-Saxon model. At the same time, the impact of the continental system on the development of the procedure is also evident, and it is not difficult to observe that some stages of the proceedings were derived from this procedure. According to repeated rumour, when the American delegation (in a manner known from the ICTY and ICTR creation process) presented a proposal of procedure completely based on the American legal tradition, the French delegation produced a new alternative concept overnight, this one based completely on the principles of the

[48] The Regulations have been amended three times, so far: on 14 June, on 14 November 2007 and on 2 November 2011.

[49] See: Guariglia (2002), p. 1119; Roberts (2001), p. 572; Swart and Sluiter (1999), p. 127.

[50] See: Sluiter et al. (2013), p. 50.

French procedure. It was only such a confrontation that led to finding the balance between the two legal traditions.[51] On the other hand, as a result, none of the legal systems prevails in this procedural model. Thus, two legal traditions, which had previously been considered irreconcilable, were reconciled in the proceedings before the ICC. As a result, however, the procedural framework of the ICC is also extremely complex and lacks transparency; its normative structure can be described as "byzantine".

1.2.4 Quasi-International Courts and Tribunals: Embedded in Domestic Law

In addition to international criminal tribunals, there are numerous courts whose jurisdiction is limited, both in terms of time and geography, to the territory of one state and a specific armed conflict. They are appointed by the UN authorities in consultation with governments of certain states or independently by the states with the participation of international community. These are known as internationalised criminal courts,[52] because they form a part of the national justice authorities. They constitute a unique combination of the systems of national and international justice. Among such tribunals the following are known: Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea,[53] Panels with Jurisdiction over Serious Criminal Offences,[54] Special Court for Sierra Leone,[55] Special Tribunal for Lebanon,[56] and finally there is the Supreme Iraqi Criminal Tribunal.[57]

Each of these tribunals operates differently, depending on the internal situation and international arrangements that have determined their establishment. As they are an element of the national legal system, it was necessary to combine procedure before the tribunals with domestic procedural law. The work of *quasi*-international tribunals is most often governed by internal law of the state in which the proceedings are pending; it is sometimes modified by adding the elements of international procedure. The fact that the procedural law does not differ much from the procedure known to national courts enhances its recognition and legitimisation in a given state; implementation of an entirely new procedure could impair legal

[51] See: De Hert (2003), p. 79.

[52] Or *quasi*-international tribunals, mixed or hybrid tribunals, as, *inter alia*, defined by: Bassiouni (2003), Cryer et al. (2010), and Ambos and Bock (2012).

[53] Law of 10.8.2001, http://www.eccc.gov.kh. Accessed 3 Nov 2014.

[54] On the basis of S/RES/1272 (1999) 25 October 1999.

[55] S/RES/1315 (2000) 14 August 2000. Althought the Special Court for Sierra Leone is often considered to constitute an ad hoc tribunal, just as the two above described ad hoc tribunals. E.g., Ambos and Bock (2012) p 488; Knoops (2005) p 119; Sluiter et al. (2013) p 15.

[56] S/RES/1757 (2007) 30 May 2007, Annex and Statute of the Tribunal included.

[57] Official Gazette of the Republic of Iraq, 18.10.2005.

certainty due to the fact that the tribunal is not anchored to a given legal system.[58] Therefore, the *sui generis* criminal procedure has not been developed in their case. The powers of prosecutors acting on behalf of tribunals are to a large extent based on the procedure of each of these states. The model of accusation adopted by this group of tribunals is not as uniform as the solutions adopted before the *ad hoc* tribunals and the ICC.

1.3 The Accusation Model Before International Criminal Tribunals

Each time we tend to present a model of a certain constituent, it needs to be decided what "set of basic components" is of key importance in the description of a given model. Therefore, because of the necessity to present a (relatively) concise analysis, the method of comparing the models of accusation had to be limited to the basic elements of the accusation only. While analysing the accusation model before the ICC, major components that determine its unique form have been identified.

There are seven issues that have turned out to be of principal importance in the development of the accusation model before the ICC. Analysis of the function of the accusation and the role of the ICC Prosecutor in the system of international criminal justice is of key significance here: the prosecutor may be seen as a guardian of the law or solely as an accusing authority. Also, the adopted scope of discretion (and its limits) in the selection of specific suspects under a specifically developed principle of opportunism is highly important. The scope of judicial review of the Prosecutor's actions in an investigation, which, in practice, turned out to be much broader than was originally planned by the creators of the Rome Statute, is another issue that has a significant impact on the model of accusation; gradual broadening of the scope of this review in the judicial practice has become a characteristic feature of the ICC procedure. According to the ICC judges, this solution was intended to replace the system of hierarchical and political review, non-existent in the case of the ICC Prosecutor. The information obligations arising from the disclosure of evidence institution turned out to be surprisingly similar to those developed in the legal system of one of the countries, i.e., the United States of America, although, in this case, the continental model of access to a case file would seem to be better adjusted to the needs of the international criminal tribunal. On the other hand, the impact of the Prosecutor on the consensual termination of criminal proceedings before the ICC turned out, contrary to the solutions existing in common law systems, to be limited. Issues subsequently analysed include seeking the proper balance between the proactive approach of the Prosecutor and the judge during trial, as well as the possibility of lodging an appeal against a judgement of the Trial Chamber under the appeal procedure. The aforementioned issues are not

[58] More information in: Romano et al. (2004) p 3 et seq. and: Tochilovsky (2004), pp. 319–344.

exhaustive as far as the powers and tasks of the ICC Prosecutor are concerned. These features were selected on the basis of the fact that they cover the framework of the entire course of proceedings before the ICC, and they are regulated in both the common law and the continental law traditions in a manner that is both distinct and different. They were also selected in a way that demonstrates to the fullest extent why certain solutions are consistent with the common law approach while others are based on the continental systems.

The development of the presented procedural institutions shows that it is possible to establish a distinct model of accusation that can be adjusted to the needs of international criminal tribunals. On the basis of specific procedural solutions and institutions of criminal proceedings, it will be presented, first, how the institutions related to the development of the accusation model were derived from specific legal systems and, second, what the course of the process of amending them in the ICTY and ICTR forum was and thus how they have been adopted to the tasks of international justice and the specific forum in which they were to operate from the moment of establishment of the ICC. Therefore, the analysis of the model of accusation before the ICC was combined with legal comparative research.[59] Comparative law is therefore used not as a single legal body but only as a method of analysing the law before the ICC, as understanding the accusation model and analysis of the procedural institutions depend on the understanding and analysis of the origin and content of a given institution in the state from which it derives, as well as by taking the context of its application into account.[60] The presented analysis is to achieve a double aim: it presents technical rules of procedure, while at the same time it also analyses the reasons why a certain solution was chosen. Moreover, it is not limited to a static description of an instant image of international criminal procedure at a given moment but presents a wider view of evolution of norms over time, showing how rapidly and significantly they have changed over a relatively short period.[61] Therefore, this analysis also aims to present "the transformations the idea may undergo when initially transferred from the source to the target legal system".[62]

The different systemic positioning and powers of public prosecutors were analysed during the works on the Rome Statute. Negotiations on the final model of accusation before the International Criminal Court served as a workshop during which experiences of various legal traditions and cultures were studied. During these negotiations, several legal orders were examined. From among these orders,

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[59] The use of comparative law to describe the issues of international criminal law is a common tool of legal analysis, as M. Delmas-Marty states: "by postulating a relationship between comparative law and international criminal law, as an extension of the interaction between international and national legal systems, it suggests a pluralist conception of international criminal law": Delmas-Marty (2003), p. 13.

[60] As in Heinze (2014), p. 187.

[61] Trying to avoid errors committed in analysis of the international criminal procedure topics as mentioned by Mégret (2009), p. 41.

[62] In the words of Langer (2004), p. 33.

three were selected for the needs of this study. This selection was necessitated by the need to limit the scope of the comparative study to those selected legal systems that would be most representative of the ICC accusation model. It was assumed, for this study, that the German and Polish systems would be used as representative of the continental tradition, while the English and American systems would serve as representative of the Anglo-Saxon tradition. The systems of England and the United States were considered to be both most influencial and best known by the authors of the Rome Statute. The system of German law was selected as a representative for the national systems of continental law because it has attributes that are characteristic for all systems of Germanic states, as well as due to the fact that it has also had the highest impact on the development of the law in this part of our continent. The Polish model of accusation is, in turn, the most familiar to the author of this monograph; it should also not be ignored that this system is rooted in the legacy of Germanic law and largely influenced by French law. It is also interesting to notice that the Polish model of criminal procedure is presently undergoing serious changes that shift it towards the Anglo-Saxon model and away from the German tradition. Therefore, it will become a poor example for the needs of this comparative research. This text is being prepared in the time of a monumental re-codification, during an extended *vacatio legis* of the Act of 27 of September 2013 amending the Code of Criminal Proceedings (on the 1st of July 2015) which makes it difficult to apply rigid schemes to the Polish criminal procedure system at the moment. At the same time, these changes prove how the main features of a given legal tradition can shift and change not during centuries but while preparing one book.

This study will analyse the procedural institutions derived from the four legal systems that have determined the accusation model before the ICC. Naturally, it is not the objective of this work to present a detailed description of the development of the aforementioned institutions but rather to present some basic assumptions and to demonstrate how they have been implemented into the model of accusation before the ICC. Neither does this study aim at comparing the different criminal proceeding systems, but it constitutes an attempt at building a theoretical model based on the main determinants that have been captured generally.

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