

# DECISION-MAKING PATTERNS AT THE FIRST TRIAL OF INTERNATIONAL CRIMINAL COURTS: A PERSPECTIVE ON THE ICC

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*The first trials of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") resulted in convictions of the accused. This Article seeks to understand this observation by applying new institutionalist perspectives to decision-making processes of international criminal courts and tribunals. This Article argues that the first trials of such courts are affected by a learning curve and should be differentiated from other trials because of, inter alia, the novelty of the proceedings, the absence of previous jurisprudence, and the need to develop modi operandi, often from scratch. It then discusses decision-making patterns at the first trial, with reference to logics of action, and posits that, at the first trial, the logic of consequentiality is dominant, as the court would still not have determined its bounds of appropriateness, a phenomenon it terms the "first trial syndrome." The Article concludes by applying this perspective to the first trial of the International Criminal Court ("ICC").*

## INTRODUCTION

International criminal courts and tribunals generally deal "with the most horrific, large-scale crimes human beings can commit."<sup>1</sup> The horror of these crimes, as well as the intense suffering by victims, have to some degree put the international community, including the human rights movement, "on the horns of a dilemma: vindicate the due process rights of the accused or adequately punish the perpetrator?"<sup>2</sup>

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<sup>1</sup> Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 689 (2007).

<sup>2</sup> *Id.*

The framers of international criminal courts do not remain neutral and unaffected in the face of this dilemma but rather are guided by a preference for the overarching value of accountability. This value preference eventually crystallizes in the legal frameworks<sup>3</sup> of the international criminal courts themselves, giving rise to a structural leaning towards retribution and deterrence. Such frameworks are, therefore, value-laden.

However, while the presence of these values is acknowledged, it is argued that they are not *per se* deterministic and do not operate to constrain judicial decision-making. Instead, the statutes of international criminal courts account for other relevant values, such as human rights and due process. Thus, in what one commentator considers the “interplay of meaningful acts and structural contexts,”<sup>4</sup> acts of judicial decision-making remain relatively autonomous from any structural determinants.<sup>5</sup>

Several factors may influence the relative importance attached to varying, and frequently competing, sets of values. For instance, in respect of due process considerations, another commentator observed that “[w]hether or not sufficient due process protections exist within a system depends in part on the *priority* those protections are given relative to the consideration of other interests in the trial process, such as the right of victims or the interest of the judge in excluding hearsay evidence.”<sup>6</sup> This clearly favors an approach that places stronger emphasis on due process protections for the accused. He posits that “it is better for the credibility of a budding international criminal common law to err on the side of stronger protections rather than weaker,”<sup>7</sup> while decrying the fact that “in the early days of the ad hoc Tribunals for Yugoslavia and Rwanda, rules of evidence and procedure were considered largely ‘technical,’ and thus to some extent dispensable.”<sup>8</sup>

Another scholar goes one step further and attempts to identify the structural limits on the growth of international criminal procedure and, in particular, due process rights for the accused.<sup>9</sup> He

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<sup>3</sup> The term “legal framework” refers to the collective of statutes, rules of procedure, and other regulations governing a particular international criminal court.

<sup>4</sup> Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the future of Public Law*, 82 AMERICAN POLITICAL SCIENCE REVIEW 89, 101 (1988).

<sup>5</sup> SUE DAVIS, THE CHIEF JUSTICE AND JUDICIAL DECISION-MAKING: THE INSTITUTIONAL BASIS FOR LEADERSHIP ON THE SUPREME COURT, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

<sup>6</sup> Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1394 (2001) (emphasis added).

<sup>7</sup> *Id.* at 1437.

<sup>8</sup> *Id.* at 1383.

<sup>9</sup> Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 637 (2007).

proceeds to identify three broad phenomena that limit the growth of international due process growth: “(1) fragmentation of enforcement; (2) integration of conflicting legal systems; and (3) gravity of the crimes involved.”<sup>10</sup>

When considered against the value of accountability, entrenched as it is in the legal frameworks of international criminal courts, the relative weakness of due process rights may bear upon the overall process of judicial decision-making; however, these factors alone may not fully explain or determine the outcome of such decision-making. The question, therefore, arises as to whether further factors influence the careful calibration and balancing of judicial decision-making.

This Article will attempt to answer this question in relation to the first trial of international criminal courts. The reasons for singling out the first trial of international criminal courts will be expanded below. The Article will first proceed by considering a possible answer to the question posed above, drawn from the behavioralist camp, which places emphasis on the pre-formed preferences and attitudes of the relevant actors.

In another article on this subject, the author evaluated and positioned the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) judicial decisions along conservative-statist<sup>11</sup> and progressive-cosmopolitanist<sup>12</sup> spectrums to shed more light on “the structural and cultural factors that influence judicial policy-making in national and international courts,” with a view to applying the lessons to the ICC.<sup>13</sup>

That author’s consideration of *Akayesu*, the first case addressed in the ICTR, is particularly illuminating. He describes the case as “a microcosm of the complex relationship between the professional norms of the community of judges, their past humanitarian advocacy, and progressive development [of International Humanitarian Law (“IHL”).]”<sup>14</sup> In his analysis, the author attaches great weight to the pre-formed, professional norms of international criminal judges, arguing that these are more likely to favor robust judicial decision-making.

For instance, he believed Judge Navanethem Pillay’s presence on the bench was critical in the amendment of the indictment in *Akayesu* to include gender-based crimes. He cited concurring

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<sup>10</sup> *Id.* at 640.

<sup>11</sup> The conservative-statist view envisions international law as the product of a common *demos*.

<sup>12</sup> The progressive-cosmopolitanist view conceptualizes international law skeptically and in tension with norms of state security on the “right” and national democracy often on the “left.”

<sup>13</sup> Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 377, 380, 384 (2006).

<sup>14</sup> *Id.* at 391.

authority and said “crucial to [the amended indictment’s] inclusion [of the sexual violence charge] was the presence of Judge Navanethem Pillay of South Africa on the bench, a judge with extensive expertise in international human rights law and gender-related crimes.”<sup>15</sup> He then proceeded to substantiate his view by making reference to Judge Pillay’s extensive record of advocating for women’s causes and “her reception of the 2003 Women’s Rights Prize in South Africa,” accompanied by a \$200,000 cash award.<sup>16</sup>

While the importance of the background and preferences of the individual judges at international criminal trials should not be discounted, it is difficult to concur with an assertion that, at international criminal courts, “checks and balances, as well as other background norms which shape the perception of the appropriate judicial role, are either absent or, at best, ill-fitted.”<sup>17</sup>

This Article seeks to explain patterns in judicial decision-making, not on the basis of behavioralism but rather on the basis of new institutionalist perspectives, which have been propounded by other scholars and authors on this subject.

#### NEW INSTITUTIONALISM

While writing about the United States Supreme Court, Howard Gillman observed that many behaviorists insisted for decades that “when deciding cases on the merits, [judges] were properly viewed as policy makers who were remarkably free to make decisions on the basis of their political preferences or ‘attitudes.’”<sup>18</sup> Indeed, political scientists treated the judicial institutions, such as the Supreme Court of the United States, as little more than “a collection of individuals who were pursuing their personal policy preferences.”<sup>19</sup>

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<sup>15</sup> *Id.* at 391–92. See also Kelly D. Askin, *Stefan A. Riesenfeld: Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 318 (2003).

<sup>16</sup> Wessel, *supra* note 13, at 392. Similarly, others argued that “this judgment...might not have come about, were it not for the intervention of Judge Pillay....” CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 168 (Philippe Sands ed., 2003).

<sup>17</sup> Wessel, *supra* note 13, at 386.

<sup>18</sup> HOWARD GILLMAN, THE COURT AS AN IDEA, NOT A BUILDING (OR A GAME): INTERPRETATIVE INSTITUTIONALISM AND THE ANALYSIS OF SUPREME COURT DECISION-MAKING, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 65 (Cornell W. Clayton & Howard Gillman eds., 1999).

<sup>19</sup> HOWARD GILLMAN, SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 1 (Cornell W. Clayton & Howard Gillman eds., 1999).

However, thanks to a number of developments, scholars began “to shift their focus away from the long-standing [questions] of how institutions are affected by the personal characteristics of judges [toward] the question of how judges are affected by the institutional characteristics within which they are embedded.”<sup>20</sup> In political science, the origin of the shift to ‘new institutionalist’ thinking was traced to James G. March and Johan P. Olsen.<sup>21</sup>

In their 1989 book, March and Olsen first observed that “in most contemporary theories of politics, traditional political institutions, such as the legislature, the legal system” and, presumably, the courts of law, “have receded in importance from the position they held in earlier theories.”<sup>22</sup> However, they also noted that “institutional perspectives have reappeared in political science,” reflecting an “empirically based prejudice,” which is essentially “an assertion that what we observe in the world is inconsistent with the ways in which contemporary theories ask us to think that the organization of political life makes a difference.”<sup>23</sup>

The authors attributed this ‘re-discovery’ of institutions to the increasing importance and complexity of institutions in contemporary life. They noted this renewed interest in institutions was not peculiar to political science but was also a recent trend in other disciplines, including public law.<sup>24</sup> Another author agreed with March and Olsen in observing that “institutions appear to be ‘more than simply mirrors of social forces.’”<sup>25</sup> That author believed that institutions, such as international criminal courts, “have a kind of life of their own. They influence the self-conception of those who occupy roles defined by them in ways that can give [persons] distinctively ‘institutional’ perspectives.”<sup>26</sup> Further, he was mindful that moving the focus away from the attitudes of individual judges and towards institutions and structures might be too full of reification and anthropomorphism. However, there is no need for the new institutionalist approach to be taken so far. New institutionalism requires us only:

to stress how background structures *shape* values and interests, not to speak as if they have interests of their own. Most of our experience certainly suggests that human action such as judicial decisions are indeed influenced by a great range of structural contexts – by the actor’s position within state agencies

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<sup>20</sup> GILLMAN, *supra* note 18, at 66.

<sup>21</sup> CORNELL W. CLAYTON, THE SUPREME COURT AND POLITICAL JURISPRUDENCE: NEW AND OLD INSTITUTIONALISMS, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 30 (Cornell W. Clayton & Howard Gillman eds., 1999).

<sup>22</sup> JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 1 (1989).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2.

<sup>25</sup> Smith, *supra* note 4, at 95, 101.

<sup>26</sup> *Id.* at 95.

or political parties, by economic relations, by ideological outlooks, by enduring ethnic alliances, and so on. But the result is often that actors are faced with so many conflicting imperatives that they retain significant room for choice....<sup>27</sup>

New institutionalism seeks to explain what shapes these choices. New institutionalism embraces several different approaches. As Gillman and Clayton noted, “there are nearly as many ways to think about institutions as there are practitioners of institutional analyses.”<sup>28</sup>

In a review of the literature on new institutionalism, one scholar identified at least three broad camps of new institutionalism: historical, rational choice, and ethnographic or social institutionalism.<sup>29</sup> Another scholar suggested the two major approaches of particular relevance to judicial institutions are historical-interpretive and rational-choice institutionalism. Both approaches emphasized the importance of “assigning a more autonomous role to social,” political and, in this case, judicial institutions, and of exploring the interplay between the institutional role and the behavior of actors.<sup>30</sup> As one author observed “[a]lthough the two versions of the new institutionalism overlap to the extent that they share the conviction that institutional arrangements matter, from there they take very different paths. To some extent it may be possible to develop a viable argument that there is room in law-and-courts scholarship for *both* approaches.”<sup>31</sup> Indeed, other observers have called for a “general approach’ that would attempt to explain how both rules and anticipated consequences affect behavior and outcomes.”<sup>32</sup>

It is precisely such an inclusive framework that March and Olsen set out to elaborate in their working paper “The Logic of Appropriateness.”<sup>33</sup> This framework will also constitute the basis

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<sup>27</sup> *Id.* at 100.

<sup>28</sup> GILLMAN, *supra* note 19, at 6.

<sup>29</sup> Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 *COMPARATIVE POLITICS*, 231 (1995).

<sup>30</sup> SUE DAVIS, THE CHIEF JUSTICE AND JUDICIAL DECISION-MAKING: THE INSTITUTIONAL BASIS FOR LEADERSHIP ON THE SUPREME COURT, *in* SUPREME COURT DECISION-MAKING: NEW INTUITIONALIST APPROACHES 135 (Cornell W. Clayton Howard Gillman eds., 1999).

<sup>31</sup> *Id.* at 152 (emphasis added).

<sup>32</sup> Elinor Ostrom, *Rational Choice Theory and Institutional Analysis: Toward Complementarity*, 85 *AMERICAN POLITICAL SCIENCE REVIEW*, 239 (1991). See also Robert Nalbandov, *Battle of Two Logics: Appropriateness and Consequentiality in Russian Interventions in Georgia*, 3 *CAUCASIAN REVIEW OF INT’L AFFAIRS*, 36 (2009).

<sup>33</sup> James G. Marsh & John P. Olson, *The Logic of Appropriateness*, (Arena Centre for European Studies, University of Oslo, Working Paper No. 4, 2009), *available at* [http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04\\_9.pdf](http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04_9.pdf).

adopted by this Article for its analysis of judicial decision-making at international criminal courts.

In elaborating on this framework, March and Olsen described two main logical actions that underpin institutional decision-making: the logic of appropriateness and the logic of consequentiality. They noted that:

A theoretical challenge is to fit different motivations and logics of action into a single framework....If it is assumed that no single model, and the assumptions upon which it is based, are more fruitful than all the others under all conditions and that different models are not necessarily mutually exclusive, we can examine their variations, shifting significance, scope conditions, prerequisites and interplay, and explore ideas that can reconcile and synthesise different models....We may also specify through what processes different logics of action *may become dominant*....We may also study which settings in practice enable the dominance of one logic over all others, for example under what conditions rules of appropriateness may overpower or redefine self-interest, or the logic of consequentiality may overpower rules and an entrenched definition of appropriateness.

The authors proceeded to discuss the possible relationships between the logics of action and, after concluding that to subsume one logic as a special case of the other would be an unsatisfactory approach, argued that “the suggestion of a *stable* hierarchy between logics and between types of decisions and actors is, however, not well supported by empirical findings.”<sup>34</sup>

March and Olsen observed that

[a] more promising route may be to differentiate logics of action in terms of their *prescriptive clarity* and hypothesize that a clear logic *will dominate* a less clear logic. Rules of appropriateness are defined with varying precision and provide more or less clear prescriptions in different settings and situations....In brief, rules and interests give actors more or less clear behavioral guidance and make it more or less likely that the logic of appropriateness or the logic of consequentiality will dominate.<sup>35</sup>

In the context of international criminal courts, this Article posits that while there is no set hierarchy between the logics of consequentiality and appropriateness in any given trial, it is the logic that provides the greatest prescriptive clarity that would seem to dominate judicial decision-making. Since the bounds of appropriateness at the first trial of an international criminal court would still be evolving and would not afford sufficient prescriptive

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<sup>34</sup> *Id.* at 20 (emphasis added).

<sup>35</sup> *Id.* at 20–21 (emphasis added).

clarity, it is the logic of consequentiality that would dominate decision-making. This logic would resonate with, and seek to actuate, the value of accountability entrenched in the legal framework of the court in question. The recurrence of this phenomenon in the course of the first trial of an international criminal court may be referred to as the “first trial syndrome.”

This Article now proceeds to discuss the logics of action, which include the logic of consequentiality and the logic of appropriateness. It will thereafter examine the question as to why it is important to differentiate between the first trial of international criminal courts and subsequent trials. It will then briefly discuss the application of these logics in the first trials of the ICTY and the ICTR. The Article concludes by commenting on the ICC and its first trial.

## LOGICS OF ACTION

### *Logic of Consequentiality*

According to the logic of consequentiality, behavior is preference-driven and focuses on expectations about consequences. Behavior is willful, reflecting an attempt to make outcomes fulfill values, to the extent possible. This may be contrasted with the logic of appropriateness, where behavior is intentional but not willful.<sup>36</sup>

The logic of consequentiality also contends that decision-making is consequential and preference-based. It is consequential in the sense that behavior depends upon anticipations of future effects of current actions. Alternatives are interpreted in terms of their expected consequences. It is preference-based in the sense that consequences are evaluated in terms of personal values and preferences. “Alternatives are compared in terms of the extent to which their expected consequences are thought to serve” the values of the decision maker.<sup>37</sup>

The following sequence characterizes the decision-making process within the logic of consequentiality:

1. What are my alternatives?
2. What are my values?
3. What are the consequences of my alternatives for my values?
4. Choose the alternative that best fulfills my values.

### *Logic of Appropriateness*

The logic of appropriateness involves determining the situation, the role being fulfilled, and then the obligations of that role in that situation. Rules are understood to include both written rules, such as laws and regulations, as well as unwritten rules, such as conventions, beliefs, paradigms, and cultures of the institution.

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<sup>36</sup> JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 160–61 (1989).

<sup>37</sup> JAMES G. MARCH & CHIP HEATH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN, 2 (1994).



Rules define relationships among roles in terms of what an incumbent of one role owes to incumbents of other roles. The terminology is one of duties and obligations rather than anticipatory, consequentialist decision-making. The institution defines what is appropriate for a particular person in a particular situation, and this is transmitted through a process of socialization. When individuals enter an institution, they try to discover, and are taught, the rules.

The following sequence characterizes the decision-making process within the logic of appropriateness:

1. What kind of situation is this?
2. Who am I?
3. How appropriate are different actions for me in this situation?
4. Do what is most appropriate.

Describing behavior as “rule-following” is only the first step in understanding how rules affect behavior, since rules and their applicability to particular situations are often ambiguous. The process includes the whole panoply of actions and constructions by which the logic of appropriateness is implemented in the face of conflict and ambiguity. Thus, “the criterion is appropriateness, but determining what is appropriate in a given situation is a nontrivial exercise.”<sup>38</sup> Moreover, “the logic of appropriateness is a logic attached to an ‘evolving conception of propriety.’”<sup>39</sup> “Decision makers follow rules,” but rules change and evolve through a number of different, intertwined processes.<sup>40</sup>

Both logics require thoughtful action. They are, however, distinguished by the demands they make on the abilities of decision-makers. The logic of consequentiality makes great demands on the abilities of decision-makers to anticipate the future and to form useful preferences. The logic of appropriateness, on the other hand, makes great demands on the abilities of decision-makers to identify the situation and determine the appropriate response.

Both processes assume that decision-makers have relatively high reasoning skills. March underscored that “[e]ach logic is consistent with the glorification of the human estate and with high hopes for human action. *Both are plausible processes for reasoning, reasonable decision makers.*”<sup>41</sup>

#### WHY DOES THE FIRST TRIAL MATTER?

Having briefly described the logics of action that may influence judicial decision-making, it is important to return to the question of why the first trial matters and why it is important to distinguish the first trial from other international criminal trials—a distinction that is not often made in the literature.

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<sup>38</sup> MARCH & OLSEN, *supra* note 36, at 25.

<sup>39</sup> MARCH & HEATH, *supra* note 37, at 77.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 101 (emphasis added).

One author depicted a telling scenario that highlights some of the challenges the ad hoc Tribunals may have faced at their first trial:

Imagine you are a judge in a newly established jurisdiction where you are not bound by precedent and have only a set of procedures that tell you the accused shall have the right to remain silent and the right to be assisted by counsel. You then face a series of motions, all matters of first impression in your court. One is a motion to compel a handwriting sample, another is a motion to compel private papers, and a third is the introduction of an interview taken in the absence of counsel in another jurisdiction where the law prohibits counsel. The ad hoc Tribunals represent such a case study.<sup>42</sup>

The first trial of an international criminal court is intrinsically connected with the maturation cycle of the court at issue. Parties and participants will be affected by the novelty of proceedings and will be occupied with developing norms and approaches for the court in question, bearing in mind its unique *sui generis* nature. This process must, moreover, be carried out in the absence of “international general rules on international criminal proceedings.”<sup>43</sup>

Throughout the first trial, international criminal courts will be affected by a learning curve whereby they will develop and refine their working methods and approaches, gain invaluable experience, and eventually develop an indigenous sense of appropriate behavior, i.e. its “appropriateness.”

While this cycle of maturation appears like an inevitable feature of the first trial of such courts, the literature does not often acknowledge this. To the contrary, this feature is often disregarded, if not dismissed altogether, the assumption being that international criminal courts require no learning curve and have a fully-fledged sense of appropriateness from the word go, from the first trial.

In this respect, the available literature rarely makes reference to the need for a learning curve in the conduct of the first trial in international criminal courts. Perhaps, the reason for this is the tacit expectation that such courts ought to be capable of operating at full maturity and capacity from their inception.

For instance, writing about the ad hoc Tribunals, scholars observed that, unlike some national legal systems that have matured slowly and gradually over hundreds of years, “international tribunals

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<sup>42</sup> Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1431 (2001).

<sup>43</sup> GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 23 (2005) (quoting ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 389 (2003)). Although the ICTY “adopted the first ever comprehensive code of international criminal procedure,” this was not of universal application, but rather, it was “adapted to the special needs of the Tribunal....” See ILIAS BANTEKAS AND SUSAN NASH, INTERNATIONAL CRIMINAL LAW 518 (2007).

are expected to move from a standing start (consisting of a brief statute and little else) to develop an appropriate legal system and to hold trials delivering satisfactory results within a few years.” Making a similar point in relation to the ICC, another author noted that “[i]n terms of experience, [the ICC] would be, metaphorically, a *child*. But this child would—having regard to the seriousness of the crimes and their consequences—have to *be immediately capable of acting as an adult*.”<sup>44</sup>

The expectation that international criminal courts may operate at full maturity from inception is empirically questionable. Thus, it is little wonder that authors have remarked that “[t]his asks a very great deal of them.”<sup>45</sup> I would argue that the experience gained from the first trial cycle is essential for international criminal courts to be capable of acting “as an adult,” that is, to gain a sense of how to act appropriately.

Various examples can be extracted from the literature that show the international criminal courts developing and refining their methods and approaches in their first trials to more ‘appropriate’ methods and approaches in other trials. At the first trial of the International Criminal Tribunal of the former Yugoslavia (“ICTY”), which involved the *Tadic* case, the court consulted extensively with the parties on a wide range of procedural issues. As this was the first trial conducted by the ICTY, “the Trial Chamber sought to involve the parties in discussion of the practical and procedural aspects of the trial,” including use of courtroom technology, pre-trial briefs, financial arrangements for the Defense counsel, and cooperation of State authorities.<sup>46</sup>

With regard to the International Criminal Tribunal of Rwanda (“ICTR”), scholars undertook an extensive study of eight trials across the three chambers of the ICTR.<sup>47</sup> While the project itself did not specifically cover the first trial of the ICTR, it did demonstrate clearly that at least some of the working methods of the ICTR had in fact changed from the earlier to the later trials. For example, when confronted with oral motions on novel legal issues, the earlier trials of the ad hoc Tribunals tended to render written decisions informed by legal research. However, this practice quickly became impractical and, as “the administrative delays caused by the delivery of many formal written decisions” began to impair “the

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<sup>44</sup> JAMES CRAWFORD, THE DRAFTING OF THE ROME STATUTE, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 113 (Philippe Sands ed., 2003) (emphasis added).

<sup>45</sup> GEOFFREY NICE & PHILIPPE VALLIÈRES-ROLAND, PROCEDURAL INNOVATIONS IN WAR CRIMES TRIALS, *in* GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 144 (Gideon Boas & Hiram Abtahi eds., 2006).

<sup>46</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶19 (May 7, 1997).

<sup>47</sup> See Rosemary Byrne, *The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice*, 25 CONN. J. INT’L L. 243, 273 (2004).

efficient operation of the Tribunals,” later trials moved towards rendering oral rulings for many motions instead of written decisions.<sup>48</sup>

Another scholar noted that “each international criminal tribunal (ICTY, ICTR and ICC) has its own Rules of Procedure and Evidence.”<sup>49</sup> Not infrequently, these “rules of procedure and evidence have the daunting task of creating, rather than reflecting, a shared and coherent conception of process and professional roles.”<sup>50</sup> Moreover, as there is no overarching procedure or hierarchy between international criminal courts, each court constitutes a distinctive, self-contained legal system that cannot be assessed in comparison with domestic criminal courts.<sup>51</sup>

Such international criminal courts, moreover, operate within the sphere of international humanitarian law and international criminal law, which are themselves still developing.<sup>52</sup> International law is “decentralized,” in that “[t]here is no clear and uncontested authority in international law, no law-maker in the model of the ‘sovereign.’”<sup>53</sup> One author noted that the “absence of a supreme international criminal court means that [the work of international criminal courts] has occurred in a decentralized manner.”<sup>54</sup>

The lack of a traditional source of authority blurs the threshold “between the non-legal and the legal.”<sup>55</sup> Referring to the ad

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<sup>48</sup> *Id.*

<sup>49</sup> GEERT-JAN ALEXANDER KNOOPS, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* 23 (2005) (quoting ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 389 (2003)).

<sup>50</sup> Byrne, *supra* note 47, at 248.

<sup>51</sup> Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 584 (2000). *See also* JAMES CRAWFORD, *THE DRAFTING OF THE ROME STATUTE*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 154 (Philippe Sands ed., 2003) (stating that the ICC constitutes a “distinct and to a considerable extent an *autonomous* criminal justice system”).

<sup>52</sup> “The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing...” Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 113 (March 24, 2000).

<sup>53</sup> Anne Orford, *The Destiny of International Law*, 17 LEIDEN J. INT’L L. 441, 443 (2004).

<sup>54</sup> Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, *European Journal of International Law*, 21 EUR. J. INT’L L. 543, 554 (2010). *See also* Emanuela Fronza, *Commentary*, in André Klip and Göran Sluiter, *The International Criminal Tribunal for Rwanda 2001-2002* 481 (2003).

<sup>55</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 415 (1983), *quoted in* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 435 (2006).

hoc Tribunals, one author stated that “the normativity of international criminal law when these tribunals began their work was (and is) far from settled.”<sup>56</sup> Another calls attention to the “the absence of *clear* international standards for the rights of the accused.”<sup>57</sup> Against this background, international criminal courts, as *sui generis* systems, are thus occupied from their inception with the process of determining the bounds of appropriate conduct.

It is notable, for instance, that the Appeals Chambers of both the ICTY and the ICTR took the approach of interpreting their legal frameworks broadly to allow issues of general significance, even ones which were not strictly material to the judgment under appeal, to be raised to ensure the development of its jurisprudence.

As one author noted, “[t]his possibility of appeal, in fact, is not admitted in the text of the Statute.”<sup>58</sup> Nevertheless, in the *Akayesu* appeal judgment, the ICTR Appeals Chamber allowed, and indeed seemed to encourage, the raising of issues of general significance, noting that the Tribunal was still “at an early stage of its development” and the consideration of such issues would therefore be “appropriate” since their resolution could be important for the development of the Tribunal’s jurisprudence.<sup>59</sup>

This is not to downplay the relevance of applicable laws and general principles of law “accepted by the world’s major legal systems,”<sup>60</sup> which impose restrictions and provide guidance in this process. However, the applicable laws are not always clear,<sup>61</sup> and

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<sup>56</sup> Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT’L L. 543, 547 (2010).

<sup>57</sup> DeFrancia, *supra* note 42, at 1437 (emphasis added).

<sup>58</sup> Emanuela Fronza Commentary, in André Klip & Göran Sluiter, *The International Criminal Tribunal for Rwanda 2001-2002* 484 (2003).

<sup>59</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 21 (June 1, 2001).

<sup>60</sup> KNOOPS, *supra* note 49, at 23. The precise delimitations of such fundamental values and norms are context-related. Writing in relation to regional human rights bodies, Barnidge observed that “[i]t should not come as a surprise that the work of the African Commission and the Inter-American Commission reflects, respectively, the human rights situation in Africa and the Americas” and consequently have interpreted such rights as that on the presumption of innocence, in accordance with their regional contexts. See Robert P Barnidge Jr., *The African Commission on Human and Peoples’ Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence*, 4 AFRICAN HUMAN RIGHTS LAW JOURNAL 108, 120 (2004).

<sup>61</sup> Robinson admits that the ICTY Statute “could have benefited from an express provision on applicable law,” particularly one that clarified the applicability of national laws. See Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 584 (2000), in GIDEON BOAS & HIRAD ABTAHI, *THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY* 173 (Gideon Boas & Hiram Abtahi eds., 2006).

even such fundamental notions as those of “fair trial” may be unclear.<sup>62</sup>

Each international criminal court represents a separate, autonomous, and self-contained system<sup>63</sup>—a *sui generis* system<sup>64</sup>—in relation to other contemporary or historic<sup>65</sup> international criminal courts, as well as to other regional and domestic courts. Moreover, for a myriad of problems associated with collective action, States themselves fail on occasion to agree on appropriate rules, requiring the judges themselves “to create new, efficient norms of behavior.”<sup>66</sup>

In their extensive analysis of the ICTY’s jurisprudence between 1993 and 1998, two scholars noted that:

[t]he Statute is only a very rudimentary instrument which was further supplemented by the International Tribunal’s own Rules of Procedure and Evidence. However, legal questions kept and keep coming up in the case before the Tribunal. In dealing with these issues, it needs to be borne in mind that there was no useful precedent that could guide the Tribunal in its work. Therefore, it was and is a major challenge to the Tribunal to come up with creative solutions to legal problems in a manner that enables the Tribunal to

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<sup>62</sup> Safferling’s discussion as to whether the right to “fair trial” emanates from treaty, custom, or general principles of international law and, further, whether it may be classified as a civil and political right, an economic and social right, or neither. See CHRISTOPHER SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 25–31 (2001).

<sup>63</sup> See ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 515 (2007). With reference to the Appeals Chamber Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction at the ICTY, the authors note that the Appeals Chamber expressly confirmed the “inherent or incidental jurisdiction of any judicial body to determine its own competence, whether this is provided for in the constitutive instrument or not (that is, the so-called doctrine of ‘Kompetenz-Kompetenz.’”

<sup>64</sup> For instance, the ICTY held that the Statute “is a *sui generis* legal instrument and not a treaty...” See Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case IT-94-1-PT, ¶ 18 (August 10, 1995). International criminal courts constitute autonomous and self-contained legal systems. See Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L. L. 569, 572 (2000).

<sup>65</sup> While the ICTY regarded the Nuremberg Tribunal as its “closest historical precedent,” with reference to crimes against humanity it held that it was not bound by the past doctrine of that Tribunal, but had to apply “customary international law as it stood at the time of the offences.” See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 654, 705 (May, 7 1997).

<sup>66</sup> Wessel, *supra* note 16, at 450.

function effectively and fully respects the rights of the accused.<sup>67</sup>

This emerged clearly, for instance, in an ICTY decision on protective measures for witnesses, where the Tribunal emphasized that it had to “interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies....”<sup>68</sup> In this context, it was observed that “whilst [the ICTY] must follow existing rules of international law and domestic practice, those principles must be applied to the particular requirements of the Tribunal.”<sup>69</sup>

One scholar underscored the “challenges” arising from the fact that “international law on [due process is] not well developed.”<sup>70</sup> He points out that on account of the *sui generis* system of international criminal courts, “domestic and international norms of due process” may have to undergo substantial transformation before they could be “incorporated in a new system.”<sup>71</sup> This point was brought to the forefront in *Tadic* where the ICTY held

[a]lthough the Report of the Secretary-General states that many of the provisions in the Statute are formulations based upon provisions found in existing international instruments, it does not indicate the relevance of the interpretation given to these provisions by other international judicial bodies. This lack of guidance is particularly troubling because of the *unique character* of the International Tribunal.<sup>72</sup>

Indeed, the ICTY “could have benefited from an express provision on applicable law,” particularly one that clarified the applicability of national laws.<sup>73</sup>

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<sup>67</sup> André Klip & Göran Sluiter, *The International Criminal Tribunal for the Former Yugoslavia, 1993-1998* 9 (1999).

<sup>68</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 28 (August 28, 1995).

<sup>69</sup> Mark Mackareel Commentary in André Klip & Göran Sluiter, *The International Criminal Tribunal for the Former Yugoslavia, 1993-1998* (1999).

<sup>70</sup> DeFrancia, *supra* note 42, at 1393.

<sup>71</sup> *Id.* at 1394. See also GEOFFREY NICE & PHILIPPE VALLIÈRES-ROLAND, *Procedural Innovations in War Crimes Trials*, in GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 144 (Gideon Boas & Hiram Abtahi eds., 2006) (noting that the ICTY Tribunal had to find a “‘Tribunal solution’ to some of its procedural problems”).

<sup>72</sup> Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case IT-94-1-PT, ¶ 18 (August 10, 1995) (emphasis added).

<sup>73</sup> Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, 11 EUR. J. INT’L L. 569, 584 (2000), in GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF

Similarly, the ICTR Appeals Chamber noted that the Tribunal's legal framework contained no specific provisions on the issue of leading questions. The Chamber referenced domestic law in this area, namely the United States Federal Rules of Evidence, on which the Tribunal's general rules on examination and cross-examination of witnesses appear to be patterned. The Chamber underscored that the Tribunal's rules "*take on a life of their own* upon adoption.... Interpretation of the provisions thereof may be guided by the domestic system it is patterned after, but under no circumstance can it be subordinated to it."<sup>74</sup>

In "the absence of clear international [procedural standards],"<sup>75</sup> there is no universal understanding of what constitutes such basic principles as "fair trial." This principle has to be interpreted and developed by the international criminal court to which it applies.<sup>76</sup> What is considered "unfair" treatment will depend on the context of each individual international criminal court.<sup>77</sup> "It is by no means obvious what 'fair trial' really encompasses, and what the singular rights within the 'fair trial' concept stand for."<sup>78</sup>

Scholars have different opinions as to what constitutes fairness. One author, for instance, said that expeditiousness is one right encompassed in a fair trial.<sup>79</sup> Another author noted that "the 'conventional wisdom' among policymakers, practitioners, and commentators [within and outside academia] is that war crimes prosecutions, particularly those at the [ICTY] and its counterpart for Rwanda ('ICTR'), have frequently been too slow and that it is essential for the future success of the ICC (and other ad hoc tribunals)" to be carried out more expeditiously.<sup>80</sup> However, some delay may arguably be "*beneficial* to the pursuit of justice."<sup>81</sup> In this respect, "there is no *one* approach that will work for all cases. In each instance, the international community [and, particularly, the international criminal courts] must strike the right balance,

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INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 173 (Gideon Boas & Hiram Abtahi eds., 2006).

<sup>74</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 323 (June 1, 2001) (emphasis added).

<sup>75</sup> See DeFrancia, *supra* note 42 (underscoring the "the absence of clear international standards for the rights of the accused...").

<sup>76</sup> *Id.* at 1395.

<sup>77</sup> CHRISTOPHER SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 42 (2001).

<sup>78</sup> *Id.* at 26.

<sup>79</sup> Robinson, *supra* note 73, at 171.

<sup>80</sup> Alex Whiting, *In International Criminal Prosecutions, Justice Delayed can be Justice Delivered*, 50 HARV. INT'L L. J. 323, 323–24 (2009).

<sup>81</sup> *Id.* at 326 (2009). Thus, while it is true that "justice delayed, justice denied," it may be equally true that justice hurried, justice buried. *Id.* at 324 n.1.



depending on all of the circumstances, between the desire for expediency and the need for time.”<sup>82</sup>

From the moment of their inception, international criminal courts set out to develop and determine their own bounds of appropriate behavior, whether in relation to such basic notions as a fair trial and what the appropriate due process safeguards for the court in question are, to appropriate working methods and approaches. In this process, the court in question could usefully draw on the lessons, experiences, and expertise of other courts and tribunals—whether international, regional, or domestic.<sup>83</sup> However, even here, it would have to determine which practices to adopt and to discard in accordance with its own specificities.<sup>84</sup> It would have to be vigilant not to adopt the approaches of other courts wholesale, unless warranted, as this may impact the autonomy and *sui generis* nature of its system. Indeed, there are several examples of different international criminal courts adopting different approaches to similar substantive and procedural matters.<sup>85</sup>

An essential milestone in the maturation of international criminal courts is the conduct of the first trial. While much useful preparatory work may be carried out in advance, the bounds of appropriateness may not be effectively predetermined without the practical experience gleaned from the first trial. Throughout the first

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<sup>82</sup> *Id.* at 348. Not all commentators would agree with this approach. For instance, Nice and Vallières-Roland, who both worked at the ICTY Office of the Prosecutor, argued in favor of a twelve-month time limit for the determination of cases, including the biggest leadership cases. See GEOFFREY NICE & PHILIPPE VALLIERES-ROLAND, PROCEDURAL INNOVATIONS IN WAR CRIMES TRIALS, in GIDEON BOAS & HIRAD ABTAHI, THE DYNAMICS OF INTERNATIONAL CRIMINAL JUSTICE: ESSAYS IN HONOUR OF SIR RICHARD MAY 167 (Gideon Boas & Hiram Abtahi eds., 2006).

<sup>83</sup> “As a practical matter, donations from institutions such as the European Union have also been used to sponsor an exchange of technical assistance and experts between the ICTY, ICTR, ICC and Sierra Leone in order to ensure that each institutions [sic] is able to benefit from each other’s institutional experience and expertise.” GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 24 (2005).

<sup>84</sup> Authors noted that “in the absence of...explicit guidance, the judges of the ad hoc Tribunals have had cause to consider the value of different decisions and case law from international, regional, and national courts and tribunals.” See KARIM A. KHAN, RODNEY DIXON, ADRIAN FULFORD, AND CAROLINE BUISMAN, ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 13 (3d ed. 2009).

<sup>85</sup> Unlike the ICTY, the ICTR disallowed complete witness anonymity at the trial by limiting nondisclosure to a period before the trial, generally not exceeding twenty-one days. As such “[t]he Rwandan Tribunal’s approach demonstrates that, despite the volatility in their country, effective approaches to witness vulnerabilities do not require that the identities of the witnesses be permanently withheld from the accused.” See Christian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1422 (2001).

trial, international criminal courts gradually build their own repertoire of appropriate behavior through the delivery of judicial decisions and judgments.

### THE DOMINANT LOGIC AT FIRST TRIAL

At their first trials, international criminal courts will take forward the process of determining the bounds of their appropriate conduct, but the logic of appropriateness will not offer sufficient prescriptive clarity at that stage to guide judicial decision-making. The bounds of appropriateness at the first trial are evolving through the disposition of novel issues, the gradual accumulation of experience, and the repertoire of decisions and judgments defining such bounds. In the meantime, it is the logic of consequentiality that dominates judicial decision-making at the first trial. This logic, with its pre-eminent focus on values, readily resonates with, and seeks to give effect to, the value of accountability, a value that is embedded in the legal frameworks of international criminal courts.

The recurrence of this phenomenon during the course of a trial may be referred to as the “first trial syndrome.” Judicial decision-making at this point is primarily characterized by a consequential desire to give effect to the value of accountability, rather than by a primary concern with appropriateness. This being said, it is important to point out that, in line with March and Olsen’s view,<sup>86</sup> these two logics need not be mutually exclusive. Even though the logic of consequentiality would seem to dominate at the first trial, both logics may coexist and influence judicial decision-making. Therefore, while one would expect a number of judicial decisions at the first trial to be in line with the logic of consequentiality, it is possible, and indeed likely, that some decisions will instead follow the logic of appropriateness. In a sense, these may be considered the exceptions that prove the rule.

While it is not possible to undertake an extensive examination of the case law in this Article, the following examples are only intended to give an indication of the logic of consequentiality at the first trial.

### *Tadic trial at the ICTY*

The *Tadic* trial at the ICTY was historic because it was “the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal....”<sup>87</sup> Although *Tadic* was not the first person

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<sup>86</sup> James G. Marsh & John P. Olson, *The Logic of Appropriateness*, (Arena Centre for European Studies, University of Oslo, Working Paper No. 4, 2009), available at [http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04\\_9.pdf](http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04_9.pdf).

<sup>87</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶1 (May 1, 1997) (emphasis added). In making this assertion, the ICTY Trial Chamber II noted that its predecessors, the international military tribunals

the ICTY sentenced,<sup>88</sup> as the Tribunal's first case, "[i]ts importance cannot be underestimated, also in symbolic terms: it is the first judgment of an international criminal tribunal since Nuremberg and Tokyo."<sup>89</sup>

When *Tadic* sought to dispute the very legality of the ICTY, the Trial Chamber determined that this was a "non-justiciable" issue and that the "Tribunal was not competent to review the decision of the [UN Security Council]."<sup>90</sup> The Tribunal took the view that the ICTY was not a constitutional court with powers to review and scrutinize the legality of UN decisions by the Security Council, which had broad discretion in the exercise of its authority under Chapter VII of the UN Charter.<sup>91</sup> As commentators observed, "[t]he importance of the jurisdiction cases for the Tribunal is self-evident. Had the Tribunal found it was improperly constituted or could not otherwise exercise jurisdiction, its continuing functioning would be seriously threatened."<sup>92</sup>

It is telling that the Appeals Chamber<sup>93</sup> disagreed with the deferential approach of Trial Chamber, finding that the ICTY was indeed "empowered to pronounce upon the legality of its establishment," finding, however, that there was no defect therein.<sup>94</sup> In considering this challenge, one author observed that the Chamber responded essentially in two ways: "[with] the military tribunal analogy; and on the basis that the international arena is special, and is not subject to international standards applicable to national courts."<sup>95</sup>

With regard to the military tribunal analogy, the ICTY expressly acknowledged that, in light of the specific nature of the Tribunal and the gravity of the crimes falling within its jurisdiction, rights of due process for the accused, such as Article 6 of the European Court of Human Rights ("ECHR"), had to be "limited." The

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at Nuremberg and Tokyo, were multinational in nature, representing only part of the world community.

<sup>88</sup> The Tribunal's first sentencing judgment came from a guilty plea.

<sup>89</sup> André Klip & Göran Sluiter, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998* 11 (1999).

<sup>90</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 15 (May 15, 1997).

<sup>91</sup> Theo van Boven, *Commentary* in André Klip & Göran Sluiter, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 1993-1998* (1999).

<sup>92</sup> André Klip & Göran Sluiter, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 1993-1998* 10 (1999).

<sup>93</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 3-6 (October 2, 1995).

<sup>94</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 15, 16 (May 7, 1997).

<sup>95</sup> JAMES CRAWFORD, *The Drafting of the Rome Statute, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 129 (Philippe Sands ed., 2003).

Tribunal held that: “[the ICTY] is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.”<sup>96</sup>

With regard to the lesser applicability of domestic due process standards, the Tribunal held:

[the] appellant has not satisfied this Chamber that the requirements laid down in these . . . conventions [the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights] must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court....<sup>97</sup>

The logic of the Chamber’s decision in this case and, particularly, its readiness to accept a watered-down standard of due process protections for the accused at an international criminal trial, indicates a logic of consequentiality with its focus on the value of accountability for war criminals. One scholar protested that “[i]t seems wrong in principle to say that international criminal process is subject to a lesser standard than national criminal process...*How can my right to be tried by an impartial and independent tribunal established by law be abrogated because the tribunal is established at the international level?*”<sup>98</sup>

Interestingly, a former President of the ICTY wrote an article subsequent to this statement and cautioned that

[c]are must be taken lest the modifications [of due process rights at international criminal courts] go so far as to curtail the rights of the accused under customary international law. There is no basis for interpreting the ICCPR [International Covenant on Civil and Political Rights] as though it provided for

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<sup>96</sup> Prosecutor v. Tadic, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case IT-94-1-PT, ¶ 28 (August 10, 1995).

<sup>97</sup> Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, ¶ 42 (October 2, 1995).

<sup>98</sup> CRAWFORD, *supra* note 95, at 131 (emphasis added). The author notes that the Appeals Chamber went on to give reasons why it could be considered to be established by law, and he concludes that “we can accept the conclusion of the Appeals Chamber in the *Tadic* case, if not all of its reasoning.” *Id.* at 133. Another author argued that “there may be a bias toward taking actions that make it more likely that an individual will be found guilty and punished . . . . [However, the author finds that] [c]ontrary to the expectations of ICTY critics, it does not appear that the judges’ verdicts are influenced by ‘political’ factors.” James Meernik, *Victor’s Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 JOURNAL OF CONFLICT RESOLUTION 140, 147, 153 (2003).

one set of rights applicable at the municipal level, and another at the international level.<sup>99</sup>

As this was its first trial, the Tribunal at this stage had still not determined its bounds of appropriate conduct. It may well be argued that in reaching its decision the ICTY was guided by the logic of consequentiality, which sought to secure the prosecution of the accused and give effect to the value of accountability entrenched in the legal framework of the court, even at the cost of watered-down standards of due process protections.

### **Akayesu in the ICTR**

*Akayesu*<sup>100</sup> was the first case heard before the ICTR and the first international decision to interpret the definition of genocide.<sup>101</sup>

Not only was it the first international war crimes trial in history to try and convict a defendant for genocide, it was also the first judgment in which the accused was found guilty of genocide for crimes which expressly included sexualised violence, as well as the first time that an accused was found guilty of rape as a crime against humanity.<sup>102</sup>

In this case, the ICTR allowed and encouraged the prosecutor to charge the defendant with the crime of genocide based on the act of rape.<sup>103</sup> The prosecutor submitted the indictment against Akayesu on February 13, 1996, and it was confirmed on February 16, 1996. The trial on the merits then commenced on January 9, 1997.<sup>104</sup> However, the indictment was subsequently amended in June 1997 to incorporate, *inter alia*, gender-based crimes.<sup>105</sup>

As has been discussed above, some scholars attach considerable importance to the background and preferences of Judge Navanethem Pillay in the subsequent amendment of the *Akayesu* indictment.<sup>106</sup> However, the decision to amend the indictment may also be seen as indicating the logic of consequentiality at this first trial. When Judge Pillay stated that she was “extremely dismayed

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<sup>99</sup> Robinson, *supra* note 73, at 584.

<sup>100</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 1 (September 2, 1998).

<sup>101</sup> William Schabas, *Commentary*, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS VOLUME II (André Klip & Göran Sluiter eds., 2001).

<sup>102</sup> CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 167 (Philippe Sands ed., Cambridge University Press: Cambridge 2003).

<sup>103</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Amended Indictment, ¶ 1 (June, 6 1997).

<sup>104</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Leave to Amend the Indictment, ¶ 1 (June 17, 1997).

<sup>105</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶6 (September 2, 1998).

<sup>106</sup> See *supra* notes 16–17 and accompanying text.

that we're hearing evidence of rape and sexual violence against women and children, yet it is not in the indictments,"<sup>107</sup> her statement may be seen as indicative of a desire to give effect to the value of accountability, as entrenched in the legal framework of the Tribunal. The Tribunal's decision to allow such an amendment may, therefore, be seen as consequential towards this end.

When the issue of the amended indictment was raised on appeal, the Appeals Chamber considered, in particular, the lack of notification to the accused of the prosecutor's intention to amend and, tellingly, it found it necessary to recall that "every accused is entitled to a fair hearing."<sup>108</sup> However, while the Appeals Chamber conceded that "had it been in the Trial Chamber's shoes it would have probably acted otherwise" in dismissing this ground of appeal, it concluded that because the defendant's right to be heard was not *totally* denied and the defense had not raised further objections, "*even* if the rights of the accused had been violated, there is cause to find that the Defense had renounced all right to invoke such violations before the Appeals Chamber."<sup>109</sup>

## CONCLUSION

The above examples are intended only to provide an indication of where the logic of consequentiality may have influenced decision-making at the first trial. The above cases can provide guidance for the International Criminal Court (ICC).

"The first trial at the ICC, the *Lubanga* case, began in early 2009 after numerous postponements."<sup>110</sup> This case was significant both for the fact that it was the first test case for victims' participation before the ICC<sup>111</sup> and for the role it could play in helping to bring accountability to the Democratic Republic of the Congo (DRC). It "will also help to shape practices before the ICC...that could influence how [the Court] handles future trials."<sup>112</sup>

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<sup>107</sup> CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 170 (Philippe Sands ed., 2003).

<sup>108</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Appeals Judgment, ¶ 112 (June 1, 2001).

<sup>109</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Appeals Judgment, ¶ 113, 114 (June 1, 2001) (emphasis added).

<sup>110</sup> Alex Whiting, *In International Criminal Prosecutions, Justice Delayed can be Justice Delivered*, 323–24, 325 (2009).

<sup>111</sup> See *Lubanga Case*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.coalitionfortheicc.org/?mod=drctimelinelubanga> (last visited Sept. 17, 2011) (noting "the trial marks a turning point for the Rome Statute, the ICC's founding treaty, which entered into force only six years ago. The Lubanga proceedings will be the first test of formal victim participation in an international criminal trial.").

<sup>112</sup> *The International Criminal Court Trial of Thomas Lubanga*, HUMAN RIGHTS WATCH, Jan. 23, 2009,

Since its opening, the *Lubanga* trial has been beset by various challenges, not least by the decision to stay proceedings against the accused *sine die* on two separate occasions, both due to an abuse of process on the part of the prosecutor.<sup>113</sup> On both occasions, the Trial Chamber ordered an unconditional stay of proceedings and release of the accused from detention, subject to a five-day limit for the prosecutor to file an appeal, pending the judgment of the Appeals Chamber. On the second occasion, the Chamber held that the prosecutor's position constituted a "profound, unacceptable and unjustified intrusion into the role of the judiciary...[and while] these circumstances endure, the fair trial of the accused is no longer possible, and justice cannot be done..."<sup>114</sup>

The Chamber earlier held that where the constituent elements of a fair trial are ruptured, "the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is *outweighed* by the need to sustain the efficacy of the judicial process as the potent agent of justice."<sup>115</sup> However, on both occasions, Lubanga's release was averted. It may be noteworthy that, on previous occasions, requests for the interim release of Lubanga were refused on account of the great risk that he would flee the jurisdiction of the Court.<sup>116</sup>

The Appeal Chamber's decision to reverse the orders for the release of the accused on both occasions, despite the presumption of innocence<sup>117</sup> and fair trial concerns expressed by the Trial Chamber, may have been inspired by the logic of consequentiality, which flowed from a desire to ensure the fulfilment of the value of accountability. Naturally, the value of accountability would have suffered a severe blow had Lubanga been released and evaded the Court's jurisdiction. This would have been particularly damaging for the ICC considering that this was its first trial and it was trying to develop acceptable norms in its trial practice.

Although it is still early, and the *Lubanga* trial is *pendente lite*, these various decisions may indicate the first trial syndrome,

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[http://www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#\\_Why\\_is\\_the](http://www.hrw.org/en/news/2009/01/22/international-criminal-court-trial-thomas-lubanga#_Why_is_the).

<sup>113</sup> One occasion related to the non-disclosure of potentially exculpatory material and the other related to the non-disclosure of an intermediary's identity.

<sup>114</sup> International Criminal Court, Trial Chamber I: Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06 at 21–22, July 8, 2010, [http://www.worldcourts.com/icc/eng/decisions/2010.07.08\\_Prosecutor\\_v\\_Lubanga.pdf](http://www.worldcourts.com/icc/eng/decisions/2010.07.08_Prosecutor_v_Lubanga.pdf).

<sup>115</sup> *Id.* at 20 (emphasis added).

<sup>116</sup> *Id.* at 5. *See also* International Criminal Court, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06-586-tEN at 6, October 13, 2006.

<sup>117</sup> Rome Statute of the International Criminal Court, art. 66, Jul. 12, 1999, A/CONF. 183/9, available at [http://www.c-fam.org/docLib/20080625\\_Rome\\_Statutes\\_Criminal\\_Ct.pdf](http://www.c-fam.org/docLib/20080625_Rome_Statutes_Criminal_Ct.pdf).

whereby judicial decision-making is characterized by a consequential desire to give effect to the value of accountability, rather than necessarily by the dictates of “appropriateness,” which would still be evolving at the time of a first trial and, as such, would not afford sufficient prescriptive clarity. However, as cases proceed through international court systems, and courts mature, we will likely see a greater role for the logic of appropriateness, as this logic gains greater prescriptive clarity and becomes better able to inform and shape judicial decision-making within such courts.