

In Search of Abbreviated Criminal Procedures

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1. The Problem

When there is a criminal justice response, mass atrocities easily result in a high number of open case files concerning core international crimes (war crimes, crimes against humanity and sometimes genocide). This can overload the judiciary, so that it finds itself unable to process the opened cases at a corresponding pace, eventually leading to *de facto* impunity. This has arguably happened in Argentina, Bosnia and Herzegovina, and Colombia, among other countries.¹ Perpetrators, victims and witnesses end up dying before justice is rendered. This can undermine trust in the criminal justice systems concerned, contrary to what was one of the purposes of opening the case files in the first place. To avoid this situation, and to professionally assess the ability of criminal justice to respond to mass atrocity, we should properly explore the relevancy of the many examples of functioning abbreviated criminal proceedings in national legal systems. In October 2009, a conference organized by the Centre for International Law Research and Policy (CILRAP) in Sarajevo suggested that we analyse the interests of justice from all sides to better serve them, and that human rights-compliant abbreviated criminal procedures ('ACPs') for core international crimes should be considered with an open mind. The edited volume of conference papers – *Abbreviated Criminal Procedures for Core International Crimes*² – remains the only publication on the topic, providing a comprehensive overview and calling for further research.

This policy brief sketches possible aims and characteristics of abbreviated procedures for core international crimes, discussing existing examples in national jurisdictions, with the aim of advancing the discourse on the topic.

2. Features and Purposes of Abbreviated Criminal Procedures for Core International Crimes

The main purpose of ACPs for core international crimes is to ensure better judicial economy, while avoiding compromises in terms of rights of the accused, victims' rights, and interests of justice. By enhancing judicial economy, it is more likely that opened case files are processed within the criminal justice system, and that basic expectations of justice are met. A criminal justice system may provide means of limiting the number of prosecutions to better focus on certain crimes (such as decriminalizing minor offences or deferring cases to non-judicial mechanisms). It may also include procedures aimed at expediting certain phases of regular proceedings in order to deliver judgments with fewer resources or less time. This policy brief concerns itself only with the latter.

The ACPs considered here do not include guilty pleas and plea bargaining. Furthermore, they are assumed to meet the requirements that any judicial procedure should possess in order to be adequate for the level of justice demanded by core international crimes: hence, the procedures must be provided for by law and be sufficiently transparent, and they should be included in a wider transitional justice process. Consensual ACPs need to provide suitable and proportionate benefits to the accused in order to be effective. It is also reasonable to limit abbreviated procedures to less serious core international crimes.

In situations involving mass atrocities, efficient use of resources is crucial. This has been praised in several ICTY decisions,³ and has influenced its Rules of Procedure and Evidence⁴ and the Mechanism for International Criminal

¹ Morten Bergsmo, "More Opened Case Files Than Trial Capacity", in *idem* (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 1 (<http://www.legal-tools.org/doc/6145bc/>).

² *Ibid.*

³ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Bralo*, Trial Chamber, Sentencing Judgment, 7 December 2005, IT-95-17, p. 22 (<http://www.legal-tools.org/doc/e10281/>); *Prosecutor v. Drazan Erdemović*, Trial Chamber, Sentencing Judgment, 5 March 1996, IT-96-22, p. 16 (<http://www.legal-tools.org/doc/72fd40/>); *Prosecutor v. Biljana Plavšić*, Trial Chamber, Sentencing Judgment, 27 February 2003, IT-00-39 and 40/1-S, para. 73 (<http://www.legal-tools.org/doc/f60082/>).

⁴ Patrick L. Robinson, "Fair but Expeditious Trials", in Hiram Abtahi and Gideon Boas (eds.), *The Dynamics of International Criminal Justice*:

Tribunals. Above all, the effect on judicial economy should somehow be proportional to the impact on the legitimate interests of the accused. Any model of criminal proceedings must balance contrasting, valid rights, even when this creates a dilemma for criminal justice policy. Due process and the rights of the accused need to be upheld. Justice for core international crimes cannot lack in compliance with human rights.⁵ The jurisprudence of the European Court of Human Rights (‘ECtHR’) provides pertinent guidance on the interpretation of Article 6 of the European Convention on Human Rights which protects the defendants’ right to a fair trial. The Court has ruled that abbreviated procedures based on the informed consent of the accused facilitate compliance with due process if the benefits to the defendant are substantial and the consent is genuine.⁶

It has been noted that “there are two sides to the human rights argument”.⁷ While the rights of the accused and the thoroughness of criminal trials entail important human rights issues, impunity and incapability to bring perpetrators to justice result in open-ended violations of the victims’ human rights. The victims’ rights to truth, justice and reparation⁸ must also be guaranteed. *Res judicata* empowers truth-finding, in the best interest of victims.⁹ Core international crimes proceedings must also allow victims the exercise of their rights.

The requirements set out above outline an important distinction between ACPs and two past attempts at judicial economy for core international crimes: Colombia’s Justice and Peace Law procedure¹⁰ and the Gacaca courts in Rwanda.¹¹ The Colombian procedure has strict requirements, and applied only to confessing defendants.¹² Its impact on judicial economy was marginal: of the 31,671 demobilized paramilitaries, only 3,635 qualified and 621 confirmed their decision.¹³ The prosecution was tasked with verifying the

facts confessed by the defendants, albeit with limited resources and information – the truth-finding function was hindered as well.¹⁴ In Rwanda, the Gacaca courts were not included in the criminal justice system; judges were not required to have previous legal training or background.¹⁵ Plea bargaining was very frequent,¹⁶ and arguably abused by defendants who confessed false crimes in order to obtain the benefits of the procedure, harming the establishment of the truth.¹⁷

The two procedures, while aiming at similar purposes, have little in common with the ACPs defined by the features described above. The abbreviated nature of the procedures discussed in this policy brief does not ease the requirements they share with regular criminal proceedings for core international crimes.

3. A Comparative Perspective on Italy

Rather than exclusively considering transitional justice experiments such as those in Colombia and Rwanda, valuable examples of abbreviated criminal procedures can be found in domestic criminal justice systems. National jurisdictions can draw from a tradition of criminal law that normally surpasses, in depth and scope, international criminal legal expertise.¹⁸ Current international criminal justice institutions are young and case law, while growing, is limited.

Italy is a paradigmatic example of how national criminal legal systems can provide guidance on ACPs.¹⁹ The Italian Code of Criminal Procedure of 1988²⁰ included several abbreviated procedures seeking to balance certainty of punishment and justice.²¹ It marked the rebirth of Italian comparative legal scholarship, which played an important role in the definition of the new procedures.²²

Among the ACPs, *giudizio abbreviato*²³ stands out as a shift towards the adversarial model, safeguarding several traits and guarantees of the regular trial and empowering the defendant’s choices. The accused can opt to waive the main trial phase and have his sentence reduced by a third, if convicted. In regular Italian criminal proceedings, prelimi-

Essays in Honour of Sir Richard May, Martinus Nijhoff Publishers, Leiden, 2006, pp. 176 ff.

⁵ Bergsmo, 2017, p. 7, see *supra* note 1.

⁶ ECtHR, *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, Decision, 29 April 2014; *Scoppola v. Italy*, no. 10243/03, Decision, 17 September 2009.

⁷ Bergsmo, 2017, p. 7, see *supra* note 1.

⁸ Gilbert Bitti, “Key Elements of Possible Abbreviated Criminal Procedures for Core International Crimes”, in Bergsmo (ed.), 2017, p. 215, see *supra* note 1.

⁹ Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, p. 43.

¹⁰ Law No. 975, Issuing Provisions for the Reincorporation of Members of Illegal Armed Groups Who Effectively Contribute to the Attainment of National Peace, and Other Provisions for Humanitarian Accords Are Issued, 25 July 2005 (Law No. 975 of 2005) (<http://www.legal-tools.org/doc/ca98de/>).

¹¹ Republic of Rwanda, Organic Law 40/2000 of 26/01/2001 Setting Up Gacaca Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Between 1 October 1993 and 31 December 1994 (<http://www.legal-tools.org/doc/0bdf0f/>).

¹² Law No. 975 of 2005, Articles 10-11, see *supra* note 10.

¹³ Maria Paula Saffon, “The Colombia Peace and Justice Law: An Adequate Abbreviated Procedure for Core International Crimes?”, in Bergsmo (ed.), 2017, p. 184, see *supra* note 1.

¹⁴ *Ibid.*, p. 186.

¹⁵ Hollie Nyseth Brehm, Christopher Uggen and Jean-Damascène Gasanaba, “Genocide, Justice, and Rwanda’s Gacaca Courts”, in *Journal of Contemporary Criminal Justice*, 2014, vol. 30, no. 33, p. 336.

¹⁶ *Ibid.*, p. 340.

¹⁷ Phil Clark, “The Gacaca Courts and Abbreviated Criminal Procedure for Genocide Crimes in Rwanda”, in Bergsmo (ed.), 2017, p. 205, see *supra* note 1.

¹⁸ Bergsmo, 2017, p. 17, see *supra* note 1.

¹⁹ Kai Ambos and Alexander Heinze, “Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure”, in Bergsmo (ed.), 2017, p. 47, see *supra* note 1.

²⁰ Code of Criminal Procedure (Codice di Procedura Penale), D.P.R. n. 447 of 1988 (‘CPP’) (<http://www.legal-tools.org/doc/aee4e8/>).

²¹ Giuseppe Sabatini, *Trattato dei Procedimenti Speciali e Complementari nel Processo Penale*, Utet, Torino, 1956, p. 27.

²² Francesco Zacchè, “Il Giudizio Abbreviato”, in Giulio Ubertis and Giovanni Paolo Voena (eds.), *Trattato di Procedura Penale*, vol. 35.2, Giuffrè, Milan, 2004, p. 8.

²³ CPP, Articles 438-443, see *supra* note 20.

nary investigations end with a preliminary hearing in which an *ad hoc* judge rules on whether a case can be brought forward to the adversarial trial phase. When a defendant chooses *giudizio abbreviato*, the preliminary hearing judge must use the results of the investigations as evidence, including any means of proof provided by the accused. After the amendments mandated by Law No. 479 of 1999,²⁴ the accused may condition the activation of the procedure on the admission of evidence, which the judge must either admit or proceed with the ordinary trial. The judge may decline the request if acquiring the new evidence appears to be unnecessary for the decision or incompatible with the interests of judicial economy. The trial, normally held in chamber, can be made public if the defendant requires so. The decision is a fully reasoned judgment, no different from the regular procedure, and may result in an acquittal or a conviction. Importantly, *giudizio abbreviato* does not lessen the judge's obligation to acquit if the charges are not proven beyond reasonable doubt. The ACP can be requested for cases concerning all crimes; however, a draft law proposing the exclusion of *giudizio abbreviato* for certain serious crimes has been put forward.²⁵

The procedure is chosen by the accused; hence, in order to have a significant effect on judicial economy, the incentives must be adequate. The above-mentioned Law No. 479 of 1999, which introduced the possibility of filing a request conditioned to the admission of evidence, greatly increased the impact on the national caseload. Subsequently, *giudizio abbreviato* proceedings increased by nearly 100% from 2002 to 2008.²⁶ Justice statistics show that in 2001, Italian courts closed one abbreviated procedure for every three instances of plea bargaining. The 2009 data represent a significant success for *giudizio abbreviato*: for every ten plea bargaining agreements between defendant and prosecutor, nine abbreviated procedures were concluded.²⁷

The gain in judicial economy is warranted by the preliminary hearing judge's discretion to deny conditioned requests if the formation of the proposed evidence appears to contrast with *giudizio abbreviato*'s nature of "limited-evidence procedure".²⁸ In the scope of ACPs for core international crimes, the gain in judicial economy is meaningful only if due process and human rights are adequately upheld. Importantly, *giudizio abbreviato* is compatible with Article

6 of the Convention, as the ECtHR has ruled.²⁹ The Court affirmed that the defendant's informed decision to activate the procedure guarantees that "no important public interest is affected".³⁰ Furthering the compliance with human rights, *giudizio abbreviato*'s conditioned version offers the possibility of new evidence, empowering the defendant's right of defence.

Furthermore, the Italian procedure does not hinder the judicial establishment of truth. The ACP results in a reasoned judgment, grounded in evidence. As such, it may facilitate the transitional process, and satisfy the victims' right to truth. Victims and parties with a legitimate claim to reparation can participate in the proceedings, albeit only if they accept the activation of the procedure; regular civil proceedings remain available to victims who do not wish to be subject to the defendant's choice of procedure.

Giudizio abbreviato is an abbreviated procedure that upholds due process and human rights and results in a fully motivated judgment in which the defendant can be acquitted; it defines a judicial truth with a significant resistance to future revisionism.

4. Other Legal Systems

Other countries have implemented models of ACPs which differ from *giudizio abbreviato* and among each other with regards to procedural choices, while sharing the same purpose. We find England among these jurisdictions. Under the Magistrates' Courts Act, the accused can elect to be judged in a summary trial, allowing the court to choose among a wide variety of sanctions or conditions. The scope of the ACP is limited to offences punishable by a maximum of 12 months of imprisonment,³¹ and the accused must plead guilty at least to a lesser charge.³² Nevertheless, it is an example of an ACP, and an ancestor of *giudizio abbreviato*.

In France, immediate proceedings can be requested for offences punished with up to 10 years of imprisonment,³³ if the defendant agrees to the alleged facts³⁴ and the prosecutor considers the case ready for trial. Clear-cut time limits for the trial hearing are set in order to enhance judicial economy.³⁵

In Germany, §§417-420 of the Criminal Procedure Code define an accelerated procedure which, similarly to the Italian ACP, affects the trial and not the preliminary investigations. It is available if a swift oral trial is reasonably foreseeable, and only for cases which are either supported

²⁴ Legge 16 dicembre 1999 n. 479, Modifiche alle disposizioni sul procedimento davanti al tribunale in composizione monocratica e altre modifiche al codice di procedura penale (Amendments to the provisions regarding the criminal trial before the monocratic tribunal and other amendments to the code of criminal procedure), 16 December 1999 (Law No. 479 of 1999).

²⁵ Proposta di Legge C-4376-A, Modifiche all'articolo 438 del codice di procedura penale, in materia di inapplicabilità e di svolgimento del giudizio abbreviato (Amendments to article 438 of the code of criminal procedure on inapplicability and procedure of *giudizio abbreviato*), 4 December 2017.

²⁶ Sergio Lorusso, "Riti Differenziati e Tempi della Giustizia Penale", in Corrado Crocetta (ed.), *La Situazione della Giustizia in Italia, Analisi e Prospettive*, Franco Angeli, Milan, 2015, p. 171.

²⁷ *Ibid.*, p. 170.

²⁸ Constitutional Court of Italy, no. 216/2016, Judgment, 7 October 2016.

²⁹ ECtHR, *Hermi v. Italy*, no. 18114/02, Decision, 28 June 2005; *Scopola v. Italy*, no. 10243/03, Decision, 17 September 2009.

³⁰ ECtHR, *Kwiatkowska v. Italy*, no. 52868/99, Decision on Admissibility, 30 November 2000.

³¹ Criminal Justice Act of 2003, §154 (1).

³² John Sprack, *Criminal Procedure*, Oxford University Press, Oxford, 2015, p. 155.

³³ Code of Criminal Procedure (Code de Procédure Pénale), Articles 393-397.

³⁴ *Ibid.*

³⁵ Ambos and Heinze, 2017, p. 47, see *supra* note 21.

by strong evidence or requiring simple investigation.³⁶ The prosecutor may request the procedure from the main hearing judge who holds some discretion in determining the evidence to admit. The ACP has been subject to the ECtHR's review, finding its compatibility with Article 6 of the Convention.³⁷

Lastly, in Spain the judge can activate an abbreviated procedure³⁸ during the preliminary investigation phase for specific *in flagrante delicto* crimes that carry a maximum of five years of imprisonment or 10 years of non-custodial sentence, if they do not require extensive investigations. Mandatory police activities with special attention to the rights of the accused are likewise required.³⁹

The national examples tentatively outlined in this section demonstrate a spectrum of possibilities for implementation of ACPs for core international crimes. Drawing from the experience of national legal systems appears a necessary step, warranting further research and a comparative approach to core international crimes, not only drawing on the usual sources of the international criminal law discourse.

5. Time to Make War Crimes Justice More Cost-Effective

Some mention an expensive 'Rolls-Royce' justice⁴⁰ for international crimes, distinguished from the more pragmatic everyday proceedings for ordinary crimes. But is the criminal justice for core international crimes that we see in The Hague really the highest level of justice, if we consider all legitimate interests at stake? When mass atrocities are prosecuted, the length and cost of regular trials may contribute to large backlog of unprocessed cases and therefore to impunity, frustrating the victims' rights. The very construct of international criminal law posits that core international crimes harm humanity as a whole. If you are reading this text, chances are that you agree with this proposition. But this claim to justice on behalf of the international community is left unsatisfied when opened case files linger unpro-

cessed, potentially eroding support for criminal justice for such crimes.

In many countries, everyday abbreviated criminal procedures function cost-effectively in terms of time and resources. These procedures comply with strict human rights requirements – often subject to ECtHR or equivalent review – and meet the rights of the accused, victims and the community. Such jurisdictions include countries that are frequently consulted when arguments on customary international law or general principles of law are made in international criminal justice, such as England and France. But the most advanced practice of abbreviated criminal procedures may be found in jurisdictions that fall outside the fashionable scope of sources in the discipline of international criminal law. This brief argues that we should slightly widen the discourse.

In jurisdictions with a high number of open case files, the instruments of case mapping, selection and prioritization may not be sufficient. Abbreviated criminal procedures are also required to process a larger volume of war crimes cases, before public support wanes. If intelligently designed, abbreviated criminal procedures will also suit core international crimes, in particular the less serious among them that concern other legally protected interests than life and individual integrity. If we are serious about making criminal justice for core international crimes more sustainable, further analysis of abbreviated criminal procedures should be undertaken, discussing possible models of implementation, and testing them against the requirements defined by past and future research. A good place to start is with *giudizio abbreviato*.

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³⁶ Criminal Procedure Code (Strafprozeßordnung), §§169a, 417-420; Urs Kindhäuser, *Strafprozessrecht*, Nomos, Baden-Baden, 2016, pp. 337-38.

³⁷ ECtHR, *Rippe v. Germany*, no. 5398/03, Decision, 2 February 2006.

³⁸ Criminal Process Law (Ley de Enjuiciamiento Criminal), no. 38/2002, Article 795.

³⁹ Fernando Gascón Inchausti, Encarnación Aguilera Morales, *La Reforma de la Ley de Enjuiciamiento Criminal*, Civitas Madrid, Madrid, 2003, p. 623.

⁴⁰ Rupert Skillbeck, "Ensuring Effective Defense in Hybrid Tribunals", in *Revue Québécoise de Droit International* (Hors-série), 2010, p. 102.