International criminal trials: A normative theory

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CHAPTER 6.

CENTRALITY OF TRIAL IN INTERNATIONAL CRIMINAL PROCEEDINGS

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1. INTRODUCTION

The discussion of the functions and effects of trial in international criminal procedure in the previous Chapter sets the scene for the assessment of the role the trial phase plays within the structure of proceedings before the tribunals. As noted in Chapter 4, the ‘role of trial’ parameter stands for the normative importance and relevance of this phase in the context of administration of international criminal justice, in comparison with other phases such as investigations and pre-trial process as well as post-trial stage. The position of the trial in international systems of criminal procedure cannot be assessed in general as it can be expected to vary by jurisdiction, depending on the nuances of legal framework and practice. Furthermore, the role of trials may have changed in the course of procedural reforms that took place in individual tribunals and in the historical dimension of international criminal justice. This warrants a closer look at the status of the law and practice in different courts.

This Chapter evaluates the role and normative significance of the trial phase as part of the theoretical inquiry into the trial as a distinct procedural unit, in accordance with the
conceptual framework outlined earlier in the context of review of domestic trial arrangements. It examines some, albeit not all, key factors that have an impact on that role. The Chapter focuses in particular on the circumstances such as the increased degree of sophistication of pre-trial procedures across international criminal tribunals, including the growing emphasis on judicial managerial powers, and the practice of negotiated justice resulting in guilty pleas or its analogues. As the discussion of domestic procedural arrangements attests, these factors are powerful determinants of the status of trial as the true locus of truth-finding and decision-making. In the international context, the same factors are relevant because they may have had the effect of detracting from the importance of trial as the prime phase in international criminal proceedings. The inquiry will follow the chronology of historical evolution of procedure and cover the range of courts from the historical IMTs to the latest forms of hybrid justice.

For the sake of clarity, the term ‘trial’ in this context is to be understood as a formal phase of international criminal process, which will be delimited with a greater precision in the next Chapter, as opposed to its broader and non-legal meaning that renders it synonymous with the enterprise of criminal justice generally. Therefore, the implications of the use of alternative mechanisms of dealing with international crimes, such as truth and reconciliation commissions and grass-root justice for the role the international trials retain as a legal institution is beyond the Chapter’s scope. Section 2 poses the question of the trial as the ‘prime phase’ in international criminal proceedings and elaborates on the criteria of importance relied upon in subsequent overview of the tribunals’ law and jurisprudence. Sections 3 and 4 then inquire into the effects of the two chosen factors that inform and possibly subvert the ‘centrality’ of trial in the procedural system (pre-trial process and negotiated justice). The detailed analyses of the law and practice of the tribunals point to the conclusion that, despite the presence of the elements which might diminish the importance of the trial phase in the international criminal tribunals, the trial has always been and will remain the centerpiece of international criminal proceedings.

The focus of this Chapter is by no means exhaustive and only serves to illustrate the resilience of trial as the central phase. As Chapter 4 has shown, the pre-trial process and recourse to negotiated or consensual justice are potentially the most prominent detractors from the importance of the trial phase, in ‘inquisitorial’ civil law and ‘adversarial’ common law practice systems of criminal justice, respectively. This explains the choice of the two themes. That said, there are a host of other factors that might influence the importance of a public and oral trials in the context of the tribunals, the notable example being the grounds and standards of appellate review and the actual practice of appellate intervention because appeals inform the finality of trial outcomes. In a similar vein, a trial court’s extensive reliance on documentary rather than *viva voce* evidence puts the premium on the activities that take place in the pre-trial. This book’s principal focus on the trial phase militates against treating these matters separately or exhaustively. While the appellate framework says much about the finality of the trial outcomes and the authority of the trial court from a systemic perspective, a meaningful overview of the appellate stage in the tribunals cannot be afforded here. Even though this limitation is apt to qualify conclusions, one can be assured that the cues obtained from the consideration of the nature and scope of pre-trial judicial functions and

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1. Chapter 4.
2. Chapter 1.
3. For a definition of the trial phase and its formal boundaries, see Chapter 7.
5. On the issue of written evidence, see Chapter 12.
negotiated justice are sufficiently instructive about the role of trial in international criminal proceedings.

2. TRIAL AS THE PRIME STAGE: SELECT FACTORS AFFECTING THE ROLE OF TRIAL

The viewpoint that the trial is a ‘primary focus’ of international criminal proceedings has been stated earlier. But it has seldom been corroborated by conceptual, comparative, and tribunal-specific arguments. The premise for the claim that the trial is the ‘prime stage’ is its intensity and richness in procedural activities that constitute the core of international criminal adjudication, namely: the presentation or submission of evidence by the parties and its examination by the relevant actors in the courtroom, including parties, judges, and victims’ legal representatives, if appropriate; its assessment by the judges; deliberations and the preparation and delivery of the judgment; the handing down of the sentence and reparation orders to the benefit of the victims, where appropriate. The trial is the intended culmination of the bulk of preparatory activities occurring during investigative and pre-trial stages – the initiation and conduct of investigation, arrest and surrender of the accused, confirmation of the charges, and disclosure of evidence, and other forms of preparation for trial hearings. The outcome of the trial, a reasoned judgment (and sentencing), is a prerequisite for eventual appeals and review whose sole purpose is to resolve any challenges to its validity. Both pre-trial and post-trial proceedings therefore ‘service’ the needs of the trial phase in their different ways, either by providing the bases for holding the trial or by probing and (in)validating its outcomes.

The discussion of the roles of different stages in the context of the proceedings should not be cast in terms of competition or rivalry since each activity has a unique and equally important rationale and discharges functions crucial to effective and fair proceedings. Nevertheless, a juxtaposition of the functions of various phases helps identify the logic behind the structure and organization structure of the proceedings. The pluralism of procedural models in international criminal justice and the dynamics given to them by procedural reforms and practice shifts make the premise of the normative precedence of trial liable to errors of overgeneralization and oversimplification. Before the procedural arrangements in different courts are reviewed and compared, this premise must rather be taken as a working hypothesis. As discussed previously, the position of the trial phase as a ‘centerpiece’ should be tested against the major factors capable of potentially diminishing its role in executing the tasks set before the criminal proceedings generally.

First, it is relevant whether and to what extent the pre-trial (or, for that purpose, post-trial) stages challenge the presumed centrality of trial by supplanting its function of ‘truth-finding’ or by taking over the ‘control’ of the decisions reached at the end of the trial over the outcome of the case. The trend of strengthening of the pre-trial judicial function which can be contemplated at the ad hoc tribunals, ICC, SPSC, ECCC, and STL, and the expansion of the role played by the judges in the pre-trial, led to the emergence of, and a growing emphasis on, the judicial phase of pre-trial process. As can be learnt from the domestic domain, this development may have consequences for the systemic role held by the trial phase. The appeal phase would effectively ‘attack’ the weight and finality of trial decisions and therewith the authority of the trial phase where the appellate court has a broad discretion to disturb the trial outcomes, unabated by a high threshold for intervention in the factual findings of the trial chamber. The rigid regime for the certification of interlocutory appeal—featuring a narrower range of decisions subject to such appeals and a rigorous test for granting leave to appeal—

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8 Chapter 4, section 6.
leaves the relevant issues for resolution in the trial judgment. Combined with generous appellate grounds, the expansion of the scope of matters to be settled in the judgment potentially renders it more vulnerable to an appellate court’s review, thereby possibly detracting from its ‘finality’ and shifting the weight away from the trial phase. The more liberal the grounds for the appeals chamber to interfere with the factual findings of the trial chamber and the more assertive the practice of appellate intervention on those issues, the more are appeals elevated to the status of a de novo trial.

Secondly, by analogy with the national criminal process, extensive resort to plea bargaining reduces the number of cases solved through contested trials and may diminish the numerical, even if not necessarily normative, predominance of the trial as a mechanism for disposing of criminal cases. As pragmatic responses to the growing complexity and costs associated with the contentious trials, the guilty pleas and their analogues are the avenues for trial-avoidance which reduce the relevance of the trial contest as a paradigmatic way of administering criminal justice. They therefore bear the blame for the decline of the trial across national legal traditions. Guilty pleas, including where these result from bargaining between the parties and occur prior to the commencement of the trial, dispense with the potentially lengthy and intense trial hearings, except for the resolution of sentencing matters. Negotiated justice removes the need for full-fledged trials and changes the manner by which the verdicts are arrived at and the truth-finding objective of criminal process fulfilled. Where the parties have a prerogative in establishing the ‘procedural truth’ as the outcome of the case, with only limited opportunity for judges to verify the factual basis underlying the plea agreement, the trial process ceases to be the central locus of fact-finding and the truth essentially emerges as a consensual outcome of a dispute-settlement exercise, rather than a result of an objective factual inquiry. Hence, the parameters of the legal framework governing the negotiated justice and the relevant practice matter for the extent to which criminal process epitomizes a genuine effort to search for the truth as embodied in contested trials.

In this sense, the discussion of the position of trial in international criminal proceedings and factors affecting it can usefully be set off against the comparative law insights offered previously. As noted, and with all due caveats relating to the limitation of comparative dichotomies, the non-adversarial model rooted in the Romano-Germanic criminal procedure is landmarked by some form of exposure by trial judges to the results of official investigation, which bolsters their autonomous fact-finding role, the premium on the pre-trial, and ambitious post-trial review. But in the adversarial paradigm, the trial is the centerpiece of the proceedings – neither the pre-trial nor appeals constitute a normative threat to trial; it is rather the trial avoidance through consensual resolution of the majority of cases that is a systemic challenge to the preponderance of the trial. The ‘inquisitorial’ and ‘adversarial’ perspectives are useful in deconstructing the tribunals’ approaches with respect to issues impacting on the normative and actual value of the trial.

Third, a procedure unique to the ICTY and ICTR—the Rule 61 procedure—might be seen as a surrogate of trial; that Rule has remained dormant for the most part of the former’s lifetime and never used by the latter. Rule 61 enables the full Trial Chamber to hold a public hearing at which the prosecutor would submit to the Chamber the indictment in open court and may call and examine any witness whose statement was submitted to the confirming Judge, in case of a failure to execute a warrant of arrest within a reasonable time. This is meant as a measure in response to the impossibility of holding a regular trial due to the failure of the accused to appear, by means of which the prosecutor seeks a judicial determination that there are ‘reasonable grounds to believe’ that the accused has committed the crime and

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9 M. Damaška, ‘Negotiated Justice in International Criminal Courts’, (2004) 2 JICJ 1018, at 1019 (‘the full adjudicative process is everywhere in decline. … [V]arious devices are used that reward defendants who cooperate with authorities in their own conviction.’).

10 Rule 61(B) ICTY RPE.
resulting in the Trial Chamber issuing an international arrest warrant to be transmitted to all states. The procedure has been controversial, being held in the absence of the accused, and has been utilized only in limited cases at the early stage of the ICTY operations. While the reconfirmation of indictment under Rule 61 may resemble a trial in absentia, the ICTY repeatedly stressed that it is not meant to be one and does not amount to the trial more generally. Indeed, the rationale behind the procedure is to ensure the appearance of the accused and to urge states to provide cooperation for that end. This is distinct from the objective of establishing the guilt or innocence of the absent accused and producing the verdict. The standard of proof falls short of 'beyond reasonable standard' required for conviction. Rule 61 procedure serves to enable the Tribunal to hold a trial upon the execution of the arrest warrant and the personal service of the indictment – rather than to avoid trial. Given that this mechanism can therefore not be considered as a competitor to the trial in any sense, it will not be dealt with in the present context.

3. PRE-TRIAL PROCESS AND EXPANDING JUDICIAL FUNCTIONS

As observed with respect to national systems of criminal procedure, the pre-trial and trial procedures are inextricably linked, and this is no different at the international criminal tribunals. The position of the trial phase as the truth-finding locus depends, among others, on the nature and scope of truth-finding activities in the pre-trial phase and the extent to which those detract from the genuine examination of the evidence at trial. The transfer of truth-finding function from the trial court occurs, for example, where trial judges are involved in pre-trial investigation in some way, as opposed to merely supervising rights of the suspects and accused at the pre-trial phase. The grant of early access to the evidence collected during investigation to trial judges may also result in shifting of the task of examining the evidence and fact-finding outside of the trial framework. Where the judges may peruse evidence prior to the hearing and form early opinion about its merits of the evidence, the trial will turn into a forum for verification of the judges’ evidentiary hypotheses rather than proof-taking in a proper sense. As the following discussion shows, the evolution of international criminal procedure from the post-World War II IMTs to the most recent institutions evinces a discernible trend towards enhanced involvement of judges in the early stages of the proceedings and the growing sophistication and importance of the pre-trial phase. But the question is whether this trend in fact detracts from the ‘predominance’ of trial as the truth-seeking device.

11 Rule 61(C)-(D) ICTY RPE.
14 E.g. Rajić Rule 61 procedure (n 12), para. 3; Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III, Defence Counsels for Radovan Karadžić, Prosecutor v. Karadžić and Prosecutor v. Mladić, Cases Nos. IT-95-5-R61 and IT-95-18-R61, TC, ICTY, 5 July 1996 (‘the Rule 61 proceedings could not be interpreted as a trial’);
15 Karadžić and Mladić Rule 61 decision (n 12), para. 3.
16 Rajić Rule 61 procedure (n 12), para. 3; Nikolić Rule 61 decision (n 12), para. 3 (‘The Rule 61 procedure … does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal.’)
3.1 IMT and IMTFE

At the Nuremberg and Tokyo IMTs, the involvement of judges in the proceedings before trial was virtually non-existent and no pre-trial judicial functions were envisaged in the form of a pre-trial chamber or judge. The pre-trial proceedings were subject to limited regulation, which may reflect the strong common law imprint on the IMT’s procedural design. Article 14 of the IMT Charter set out the functions of the ‘Committee for the Investigation and Prosecution of Major War Criminals’ composed of the four prosecutors appointed by the signatory states. The Committee’s function was to approve the indictment and to lodge the indictment and accompanying documents with the Tribunal, without a review of indictment by the judges.\(^{18}\) Neither the Charter nor the Rules of Procedure foresaw judicial supervision over pre-trial disclosure of materials between the parties.\(^{19}\) The Nuremberg judges were not formally charged with the task of safeguarding the rights of the defendant in the pre-trial. The same could be observed in respect of the Tokyo Tribunal.\(^{20}\) Furthermore, it was a prerogative of the prosecutors at Nuremberg, rather than that of the bench, ‘to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial’.\(^{21}\)

The lack of judicial participation prior to the commencement of trial makes it difficult to speak of a judicial phase of pre-trial proceedings at the historical tribunals. Rule 7 of the IMT Rules of Procedure and Article 10 of the IMTFE Charter concerning pre-trial motions are the only provisions expressly dealing with that phase.\(^{22}\) This may indicate the minimal degree to which the pre-trial phase could draw the proper functions of trial or affect the importance of the trial proceedings. The clear premium on the trial in the IMT and IMTFE model dovetails into the ‘adversarial’ model of the proceedings envisaged for them by the drafters of the Charters.

3.2 ICTY, ICTR, and SCSL: Managerial judging reforms

3.2.1 Nature and evolution of judicial pre-trial involvement: An overview

The pre-trial procedure before the second-generation tribunals exemplifies the transition towards the model characterized by the increased emphasis on the judicial role prior to trial proper. This transition unfolded at least in two planes. First, in the historical process of international criminal procedure, the ad hoc tribunals’ model served as a bridge to the upgraded scheme featuring a formalized pre-trial judicial function. In the national context, the same often takes form of the judicial role in the investigation or that of a ‘judge of freedoms’ charged with the protection of the suspects’ rights. The ICC Pre-Trial Chambers, investigative judges at the SPSC and co-investigating judges at the ECCC, and the pre-trial judge at the STL are the institutions representing distinct models of judicial involvement that are partially based on domestic blueprints and contain a degree of innovation. But it is clear that the idea of envisaging a judicial role in the pre-trial stage essentially drew upon the pioneer experience of the ICTY and ICTR, which viewed the early involvement by judges as the solution for

\(^{18}\) Art. 14(c) IMT Charter.
\(^{19}\) Rule 2(a) IMT Rules of Procedure.
\(^{20}\) N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008) 75 (criticizing as ‘highly prejudicial for the accused’ the lack of judicial supervision over investigative activities, which were ‘purely executive processes’ in the IMTFE context).
\(^{21}\) Art. 15(f) IMT Charter.
\(^{22}\) Art. 10 IMTFE Charter (‘Applications and Motions before Trial’): ‘All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.’
expediting the proceedings. Second, as noted, the expansion of the pre-trial judicial role has been the key aspect of the development of the ad hoc tribunals’ procedural regimes and was meant to impact on their operations, even though the actual impact is subject to varying assessments. The ad hoc tribunals have served as the procedural laboratory for testing managerial functions of judges and continually optimizing them through rule amendments. These reforms deserve to be discussed in a greater detail.

Neither the statutes nor the original versions of the ICTY and ICTR RPE envisaged judicial powers in the context of investigation or pre-trial process. The single function of a judge in the pre-trial phase was the confirmation of indictment. But the dramatically increased workload and the length of trials compelled the tribunal judges to undertake reforms seeking to ensure expeditious conduct of trials without delays and interruptions. The focused trial preparation was identified as the key measure for streamlining the trial proceedings. In the party-driven process before the ICTY and ICTR, the parties had no particular incentives to expedite the proceedings; consequently, they could not be expected to speed up the trial-preparation activities and to reduce the length of forthcoming trials by reducing the volume of their respective cases. Therefore, the judges took on themselves the tasks of coordinating the parties’ activities in preparing for trial and exercising control over the scope of evidence proposed to be presented.

With a view to enabling the judges to play a more active role in the pre-trial phase, a number of amendments to the ICTY and ICTR rules governing the pre-trial were initiated in 1997 and 1998, resulting in the institution of status conferences, the position of the pre-trial Judge (only at the ICTY), and pre-trial and pre-defence conferences. The general rationale behind the reforms was to ‘parachute’ the judges into the arena of trial preparation by engaging them in pre-trial work with the parties as a way to reduce the length of trials. This would be achieved by facilitating the communication between the parties; providing the Chamber with advance knowledge of general lines of the parties’ cases upon which managerial measures could be taken; speeding up the inter partes disclosure; and enabling the early identification of the points of disagreement. Narrowing down the scope of disputed matters eliminates the need for the parties to lead evidence on matters that are not genuinely

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23 C. Aptel, ‘Some Innovations in the Statute of the Special Tribunal for Lebanon’, (2007) 5(5) JICJ 1107, at 1117 (the developments at the ICTY and ICTR—the introduction of status conferences under Rule 65bis and pre-trial conference under Rule 73bis—were ‘endorsed’ by states negotiating the ICC Statute as seen from the decision to create Pre-Trial Chambers). On efficiency, see Chapter 3, section 5.

24 Chapter 1, section 3.2.3.


27 See e.g. ICTY Manual on Developed Practices (Turin: ICTY-UNICRI, 2009) 53, para. 1 (‘The pre-trial stage provides an important opportunity to ensure that the trial is conducted in the most fair and expeditious manner while bringing the Prosecution and Defence together to resolve issues that can be disposed of before the trial begins.’); Bourgon, ‘Procedural Problems Hindering Expeditious and Fair Justice’ (n 25), at 529 (‘Creating the pre-trial phase of the proceedings was one of the first attempts to address the excessive length of trials.’); Report on the Special Court for Sierra Leone, submitted by the Independent Expert Antonio Cassese, 12 December 2006 (‘Cassese SCSL Report’), para. 104 (‘Effective pre-trial proceedings have been proven to shorten and streamline trial proceedings.’); Jørgensen, ‘The Proprio Motu and Interventionist Powers of Judges’ (n 26), at 126.

28 Rule 65bis ICTY, ICTR, and SCSL RPE.

29 Rule 65ter ICTY, ICTR, and SCSL RPE.

30 Rules 73bis and 73ter ICTY, ICTR, and SCSL RPE.
in dispute, thereby expediting the trial process.31 In other words, judicial intervention was seen as the way to moderate the ‘excessive and unnecessary adversarial tendencies between the litigants’.32

The tribunal principals and commentators alike have typically characterized the pre-trial reforms pioneered at the ICTY as representing a departure from the party-driven process towards a ‘hybrid model’ comprising elements of an inquisitorial model, among which the enhanced judicial control over the parties’ cases.33 From a common law perspective, it is undesirable or at least problematic to let judges familiarize with the partisan materials before trial and grant them powers to influence the scope of the parties’ cases, as it would taint their impartiality and impair their ability to perform as detached umpires in the adversarial dispute.34 But despite this conception of the judicial role, the passivity of judges during trials and limited ability to control the proceedings came to be seen as undermining efficiency and an aspect requiring correction.35 Although said reforms were presented as ‘inquisitorial’ and as a shift away from the party-driven process, the resulting model bears little resemblance with procedure in some of the Continental jurisdictions whereby the responsibility for the

31 ICTY Manual on Developed Practices (n 27), at 53, para. 2 (‘The objective of the pre-trial stage should be twofold: to dispose of as many issues as possible in order to conserve valuable court time; and to provide a solid platform for the parties and the court to determine how much time is required to present evidence of the matters in dispute.’).
33 Statement by Tribunal President Judge Fausto Pocar to the Security Council, 7 June 2006, LM/MOW/1084eA (‘shifting away from party-driven process to one that is closely managed by the Judges of the Tribunal’); A. Cassese, International Criminal Law 2nd ed. (Oxford: Oxford University Press, 2007) 376 (‘over the years there has been a gradual incorporation of significant features of the inquisitorial model into the procedural system of international criminal tribunals, initially based on the adversarial scheme.’); G. Boas, ‘Developments in the Law of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court’, (2001) 12 Criminal Law Forum 167, at 174 (‘all these amendments embody … a radical change in the focus of the ICTY on trial preparation. These amendments encompass continental law concepts whereby it is the court that determines the nature and scope of the case and determines which evidence is best tested.’); V. Tochilovsky, ‘Rule of Procedure and Evidence for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals’, (1999) 46 Netherlands International Law Review 343, at 359 (‘the ad hoc Tribunal’s criminal proceedings are evolving into a real hybrid of the two major legal systems….. The proceedings tend to combine a common-law contest between the two parties before uninformed judges and a civil-law scrutiny of evidence with active, informed judges.’); T. Meron, ‘An Historical Background and Perspective’, in ‘How to Adjudicate the most serious crimes? Best Practices of Procedure’, Proceedings of the HiiL Colloquium, The Hague, 15-16 October 2007, <http://www.hiil.org/data/sitemanagement/media/HIIIL_n10189_v1_Publication_Final_Version_Colloquium_2007(1).pdf> (last accessed on 1 September 2013), at 11 (‘Our own experience has been that the rather exclusive reliance on common law sources during our early years was a mistake. More recently, we have drawn increasingly on civil law in creating functions of pretrial and preappeal judges and expanding the authority of the judges in trial management.’); A. Tieger, ‘Fair and Expeditious Trials: The ICTY Experience’, in ibid., at 22 (‘These measures moved the Tribunal away from its common law foundations towards a civil law approach, creating a hybrid system with elements of both.’).
34 S. Saltzburg, ‘The Unnecessarily Expanding Role of the American Trial Judge’, (1978) 64 Virginia Law Review 1, at 80 (a judge ‘who attempts to usurp control from the parties compromises the integrity of the bench and often threatens the independence of the jury’); S. Doran, ‘The Necessarily Expanding Role of the Criminal Trial Judge’, in S. Doran and J. Jackson (eds.), The Judicial Role in Criminal Proceedings (Oxford-Portland: Hart Publishing 2000) 3 (‘At the heart of the modern adversarial jury trial is a fundamental tension in the judicial role, between the philosophy of restraint promoted by a system that prioritises party control over judicial activism and the need for judges to ensure that just outcomes are not sacrificed for the sake of adherence to formal adversarial norms.’); Jørgensen, ‘The Proprio Motu and Interventionist Powers of Judges’ (n 26), at 143-4.
35 Cassese SCSL Report (n 25), para. 77 (‘The adversarial model also creates opportunities for an interested party to slow down the proceedings. The Judges tend to be consigned to the role of “referees”, with only limited ability to control the proceedings. This may prevent them from efficiently and expeditiously regulating the conduct of business.’).
investigation (instruction) is entrusted to judicial officers.\textsuperscript{36} Even though the analogy between the ICTY’s pre-trial judge or designated judge at the ICTR and SCSL’s with the institute of examining magistrate (juge d’instruction) suggests itself, it is misleading because pre-trial judge is not vested with investigative powers but only with managerial competences.\textsuperscript{37} In essence, the process remains party-led rather than judge-led because the parties are responsible for bringing their cases to the court. The important difference, however, is that the judges are empowered in managing the volume of the case and moderating the parties’ presentations, both through early intervention prior to trial and at the trial, in the interest of expeditious handling of the case.\textsuperscript{38}

Regardless of intentions of judge-legislators, the reforms at the ad hoc tribunals steered the pre-trial process into a new terrain and recasting the procedural model as a sui generis amalgam of features drawn from different systems.\textsuperscript{39} As Máximo Langer’s seminal work has revealed, the ICTY pre-trial paradigm is more aptly characterized as ‘managerial judging’, rather than civil law oriented.\textsuperscript{40} The parallel between the ICTY judicial reforms and case-management techniques relied upon by the US judges in civil cases is indeed illuminating and convincing.\textsuperscript{41} The comparable methods of expediting the proceedings in serious cases in the UK should also be mentioned in this context. Thus, Lord Justice Bonomy has referred to a protocol issued by Lord Chief Justice for the ‘control and management of heavy fraud and other complex cases’.\textsuperscript{42} Its various elements—‘the prosecution providing a pre-trial brief, the defence having an opportunity to comment on it, and a real dialogue in court between the judge and all advocates for the purpose of identifying (1) the focus of the prosecution case; (2) the common ground; and (3) the real issues in the case’—constitute ‘a


\textsuperscript{38} I. Bonomy, ‘The Reality of Conducting an International Criminal Trial’, (2007) 5(2) \textit{JICJ} 348, at 351 ('Because the proceedings are essentially adversarial, they will inevitably always tend to be party-led rather than judge-led. However, the judge has an opportunity, by robust application of a number of rules, to exert considerable influence over the course of the proceedings with a view to resolving the problems that are presented by the use of a pure and undiluted form of adversarial process.'); Djiamalova and Sobirov, ‘The Right to a Fair Trial’ (n 36), at 194 (ICTY reforms transformed a judge from ‘a passive and neutral observer’ into ‘an active observer’); B. Swart, ‘International Criminal Justice and Models of the Judicial Process’, in G. Sluiter and S. Vasiliev (eds), \textit{International Criminal Procedure: Towards a Coherent Body of Law} (London: Cameron May, 2009) 114 n69 (an assessment of the ICTY reforms as a shift from party-driven process ‘is perhaps overstating the importance of recent innovations; a process does not necessarily stop being party-driven because of measures aiming to expedite proceedings at various stages.’); Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 37), at 446 (‘the pre-trial judge’s role, overall, is to gather the information that is necessary for a more efficient judicial control over the conduct of trial without substantially affecting the dominant roles of the parties involved.’).


\textsuperscript{40} Langer is credited for being the first scholar to methodically disavow the claim that the ICTY reforms were ‘inquisitorial’ by nature, despite a degree of similarity with the continental process. For a description of the ‘managerial judging system’, see M. Langer, ‘The Rise of Managerial Judging in International Criminal Law’, (2005) \textit{American Journal of Comparative Law} 835, at 874-85.

\textsuperscript{41} \textit{Ibid.}, at 886-7 n262 and 890 n282.

\textsuperscript{42} Bonomy, ‘The Reality of Conducting an International Criminal Trial’ (n 38), at 349.
clear departure from the traditional common law approach where the parties set the agenda and the defence can sit tight and put the onus on the prosecution to prove everything necessary for conviction.43

According to Langer, the phenomenon of ‘path dependency’ explains why the ICTY reforms sought to enhance the managerial competences of the judges, as opposed to grafting solutions that would amount to a radical change of the process such as by recasting it into an inquisitorial mold.44 Given the ‘adversarial’ foundations of the process, the improvisation on that basis was the only viable solution to the problem of inefficient trial process. The likely resistance to an attempted overhaul of the adversarial structure and reversal of the procedural philosophy would have been doomed the reforms to a failure. With time, the idea of ‘managerial judging’ obtained recognition – the ICTY decisions routinely repeatedly stress the need for effective case-management.45

Now that the meaning of the amended pre-trial process has been clarified, the remainder of this section will offer a cursory overview of the chronology of managerial reformed at the ICTY, ICTR, and SCSL. It will do so in light of their potential impact on the role of trial, while reserving the detailed examination for later.46 To begin with the procedural component added first, Rule 65bis on status conferences was adopted by the ICTY and ICTR in 1997 and 1998 respectively,47 while the SCSL inherited the same rule from the ICTR.48 The purpose of these conferences was ‘to organize exchanges between the parties so as to ensure expeditious preparation for trial’.49 Additionally, at the ICTY and the SCSL, status conferences enables judges ‘to review the status of [the] case and to allow the accused the opportunity to raise issues in relation thereto’, including (at the ICTY) ‘the mental and physical condition of the accused’.50 Status conferences are a form of oversight by a trial chamber or one of its judges over the progress of pre-trial preparation. As a (potentially) useful component of pre-trial procedure, these regular conferences pursue a fairly modest goal of ensuring that no outstanding issues are pending and that the trial can be commenced without undue delay.51 As the sole rationale they pursue is assisting the effective trial preparation, status conferences are obviously not meant to be a forum for fact-finding or serve any other functions associated with the conduct of trial, let alone challenge its position as the phase at which the proof-taking process is concentrated.

The second wave of relevant reforms at the ad hoc tribunals took place in the first half of 1998, as a result of recommendations advanced by an ICTY working group (‘Rules Committee’) presided over by Judge Shahabuddeen. The committee was mandated ‘to

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43 Ibid.
44 Ibid., at 905-8.
45 E.g. Order Directing the Prosecution to Comply with the Provision of Ordinary Proceedings, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, PTJ, ICTY, 24 January 2004, at 3 (‘the number of witnesses and documents involved will lead to an unconventional trial of a magnitude unknown at the Tribunal; … the conduct of such a trial along the procedural lines of common law calls for efficient management from the start to prevent a breakdown of the proceedings’).
46 On pre-trial and other conferences, see Chapter 8, section 3.2.3.
47 At the ICTY, Rule 65bis was adopted at the 13th plenary session (24-25 July 1997), see Fourth Annual Report of the ICTY, 7 August 1997, UN Doc. A/52/375-S/1997/729, para. 56. At the ICTR, it was adopted at the 5th plenary session (1-8 June 1998), ‘with a view to expediting proceedings’, by allowing judges to invite parties ‘to highlight contested or uncontested points or issues, so as to enable the Chamber, the Judge or others to limit the number of witnesses called to establish the same facts’. See Third Annual Report of the ICTR, UN Doc. A/53/429-S/1998/857, 23 September 1998, para. 15.
48 Rule 65bis SCSL RPE.
49 Rule 65bis ICTY RPE (IT/32/Rev. 11, 25 July 1997); Rule 65bis ICTR RPE (as amended on 8 June 1998); Rule 65bis(i) of the SCSL RPE.
51 For a skeptical view on the value of status conference as a managerial device, see M. Harmon, ‘The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials: A Potential Unrealized’, (2007) 5 JICJ 277, at 387-8. See further Chapter 8, section 3.2.3.A.
investigate the objective of conducting trials more expeditiously without jeopardizing respect for the rights of accused persons’ and was specially appointed to ‘enable a far greater regulation of the pre-trial stage of proceedings, including the appointment of a pre-trial Judge’. A number of recommendations by this group were approved during the 17th plenary of ICTY judges (11-13 March 1998). This resulted in the subsequent adoption at the 18th plenary (July 1998) of Rule 65ter, creating a mandate of pre-trial Judge (PTJ), Rule 73bis on pre-trial conferences, and Rule 73ter on pre-defence conferences, among others.

The institute of pre-trial judge established by Rule 65ter was meant to ‘alleviate the need for many pre-trial hearings before the full trial chamber, thus conserving judicial resources’. The ICTY Fifth Annual Report does not explain in detail the rationale for the newly adopted rules on the conferences, but the ICTY President at the time emphasized that the Rules promote judicial economy and efficiency:

These Rules provide that a Chamber may take a number of steps to ensure that the case is both ready for trial and that the issues have been narrowed prior to trial. … With regard to the control of the trial itself, the judges have found that a recurring issue has been the number of witnesses called by the parties. … We have thus adopted a Rule which allows the Trial Chamber to reduce the number of witnesses [and] to reduce the estimated length of time required for each witness. Our Rules thus provide a means by which the trial may be conducted in a more expeditious manner.

Except for pre-trial judge and Rule 65ter meetings with the parties, the reforms pioneered by the ICTY were introduced at the ICTR and inherited by the SCSL. At the 5th plenary session of the ICTR judges (June 1998), with the benefit of hindsight as to the Shahabuddeen group’s recommendations and three months after the ICTY amendments, the ICTR adopted Rules 73bis and 73ter. While the ICTR reforms generally adopted the idea behind the Shahabuddeen group proposals, the ICTR’s non-incorporation of the formal position of PTJ illustrates that its judges retained a legislative autonomy by enacting procedures deemed fit for the ICTR context. The gap between the two tribunals has gradually widened due to the diverging amendments and their different pace, making their pre-trial procedure unique in certain ways.

The direction consistently pursued at the ICTY was the expansion of the powers of PTJ and compelling parties to deliver information on forthcoming cases with to discuss matters in order to identify uncontested matters as early as possible. As will be discussed shortly, the November 1999 amendment of the ICTY RPE transferred some managerial functions of the full Trial Chamber in connection with pre-trial and pre-defence conferences to PTJ and mandated that those be carried out in advance. The deadlines for submitting pre-
trial filings were made more specific and shorter. Another notable tendency at the ICTY was the steady expansion of case-management powers exercised by the Trial Chamber during pre-trial conference. By the 12 April 2001 amendment, the Chambers were authorized not only to ‘call upon’ the prosecutor to reduce the number of witnesses to be called at trial, but also to set the number of witnesses and to determine the time available to the Prosecutor for presenting evidence.

Given that the length of trials is to a great extent determined by the breadth of indictments, the judges eventually granted themselves prerogatives to narrow down the scope of charges. The 17 July 2003 amendment added the novel power to ‘fix a number of crime sites or incidents comprised in one or more of the charges’ which ‘are reasonably representative of the crimes charged’ (Rule 73bis(D)). This amendment was enacted at the 28th plenary session (July 2003) upon the proposal of the Judicial Practices Working Group, tasked with exploring ways of enhancing efficiency of trial proceedings. By providing the Chamber with ‘a discretionary power to fix a number of crime sites or incidents as representative of the crimes charged in the indictment and to restrict the prosecution’s presentation of evidence to those sites or incidents’, Rule 73bis(D) vested in it a ‘greater authority to control the scope of the case presented by the Prosecution’.

In 2006, due to the pressure of the completion strategy, the Rule 73bis(D) prerogative was taken even further as it proved insufficient to ensure the prosecution’s cooperation with the managerial court. Thus, the Trial Chamber acquired a power, after having heard the prosecutor, ‘to invite [him or her] to reduce the number of counts charged in the indictments’ and, based on the complete file relating to prosecution case submitted by PTJ prior to the pre-trial conference, ‘to direct the Prosecution to select the counts in the indictment on which to proceed’. This no less than revolutionary amendment, adopted over the ICTY OTP’s vigorous objection, merited an extensive explanation in an annual report:

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Trial Chambers are also proactively expediting trials. Notably, Trial Chambers are using rule 73bis to oblige the Prosecution to focus its cases. Rule 73bis allows the Trial Chamber at the pretrial conference to order the Prosecution to limit the presentation of its evidence and to fix the number of crime sites or incidents contained in one or more of the charges. Calls for cooperation from the Prosecution to reduce its lengthy cases have been less than satisfactory. Aware that the length of trials begins with the breadth of the Prosecution’s indictments, the judges adopted an amendment to rule 73bis to allow a Trial Chamber to invite and/or direct the prosecution to select those counts in the indictment on which to proceed. This amendment is necessary to ensure respect for an accused’s right to a fair and expeditious trial and to prevent unduly lengthy periods of pretrial detention. The Prosecutor strongly opposed this amendment, even though focusing indictments is part of the trial management commonly used in national jurisdictions and does not impact on prosecutorial prerogatives.

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58 The time limit within which the TC could set the deadline for the submission of the prosecutor’s pre-trial brief and other materials was changed as follows: ‘before the date set for trial’ (Rule 73bis(B) ICTY RPE (IT/32/Rev. 13, 10 July 1998)), ‘before the Pre-Trial Conference’ (Rule 65ter(E) ICTY RPE (IT/32/Rev. 17, 17 November 1999), and ‘not less than six weeks before the Pre-Trial Conference’ (Rule 65ter(E) ICTY RPE (IT/32/Rev. 20, 12 April 2001). The time range within which the correspondent defence deadline could be set was also progressively shortening: Rule 73bis(F) ICTY RPE (IT/32/Rev. 13, 10 July 1998) (until not later than seven days before the trial); Rule 65ter(F) ICTY RPE (IT/32/Rev. 17, 17 November 1999) (‘within a time-limit set by the pre-trial Judge and seven days before the Pre-Trial Conference’); Rule 65ter(F) ICTY RPE (IT/32/Rev. 20, 12 April 2001) (‘within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference’).

59 Rule 73bis(C) and (E) ICTY RPE (IT/32/Rev. 20, 12 April 2001), Cf. Rule 73bis(C) and (E) ICTY RPE (IT/32/Rev. 17, 17 November 1999) (‘the Trial Chamber may call upon the Prosecutor to reduce the number of witnesses if it considers that an excessive number of witnesses are being called to prove the same facts.’)

60 Rule 73bis(D) ICTY RPE (IT/32/Rev. 28, 17 July 2003).


62 See Chapter 3, section 5.

63 Rule 73bis(D) and (E) ICTY RPE (IT/32/Rev. 38, 30 May 2006).

Besides its opt out regarding the institution of PTJ, the ICTR seemed unwilling to keep up with all aspects of ICTY reforms. The absence of a formal PTJ position at the ICTR did not imply that similar pre-trial management functions were not exercised at all or that all routine pre-trial work was done by the full Chamber, which would be impractical. In fact, as clarified by several ICTR judges during interviews, the functions analogous to PTJ were carried out by designated Judge – the member and often the President of the Trial Chamber trying the case.\(^{65}\) In the absence at the ICTR of Rule 65ter, the trial-preparation tasks fell within the general authority under Rule 54, authorizing a judge or a trial chamber to issue such orders as may be necessary for the preparation of the trial.\(^{66}\) But due to the absence of the formal position of PTJ, it is logical that the ICTR chose not to emulate the ICTY amendments aimed at strengthening PTJ powers.\(^{67}\) One gathers from the personal interviews that this may have been due to a more cautious attitude towards managerial measures exercised prior to trial.\(^{68}\)

As a consequence of this approach, ICTR Rules 73bis and 73ter retained their original language, albeit with some important exceptions, which entrenched differences between the two ad hoc tribunals. Turning to exceptions, on 26 June 2000 (8th plenary session), ICTR judges were authorized to order each party to file with the Chamber, prior to pre-trial and pre-defence conference, copies of written statements for each witness whom they intended to call.

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\(^{65}\) Interview with Judge Erik Møse, ICTR, ICTR-PJ/04, 20 May 2008, at 4 (‘It is important not to place too much emphasis on the different wording of the two sets of Rules of Procedure and Evidence. We have, at least to some extent, also pre-trial Judge arrangement at the ICTR. … This work includes many tasks, including deciding on motions, disclosure issues, translation, witness protection, etc. As I am the presiding judge, I will usually in practice perform the functions of the pre-trial Judge, ensuring the preparations of draft decisions that will be signed by me, or by the three judges if the disputed issues should be decided by the full bench. This arrangement saves time and resources.’); Interview with Judge Egorov, ICTR, ICTR-PJ/06, 20 May 2006, at 4 (‘we have something similar. The President assigns the Chamber. Very recently we were assigned to be responsible for a case. … The Presiding Judge monitors this preparation and, once there is an impression that the case is trial-ready, based on the parties’ submissions, we determine the date for the start of the trial.’); Interview with Judge Short, ICTR, ICTR-PJ/05, 23 May 2008, at 2 (‘Even though we do not have the ICTY system, where you have a pre-trial Judge who is assisted by counsel to develop a work plan, I think we achieve the same results. However, in a recent workshop organized by the Tribunal for Chambers staff, the idea of the Presiding Judge of a Pre-Trial Chamber designating one of the Judges to handle pre-trial matters was debated and quite a number of the participants were in favour of the idea.’); Interview with Judge Weinberg de Roca, ICTR, ICTR-PJ/07, 19 May 2008, at 2 (the difference between the ICTY PTJ and its ICTR analogue is limited); Interview with an ICTR Judge, ICTR-AJ/09, at 3 (‘The absence of a pre-trial Judge as a figure under a specific rule does not mean that we do not have pre-trial procedures here. The rules here, even without 65 ter, envisage that there should be pre-trial procedures. … What happens here is that the Chambers are appointed before the trial starts. And even though they do not have the title, Pre-Trial Chambers, in fact, that is what they are, … You would have noticed if you look at the composition of our Trial Chambers that very often you have one Trial Chamber that has been appointed at a certain stage. When the trial commences, a different Trial Chamber is appointed. So, even though the terminology has not, in fact, been used, one can deduce from the practice that there are pre-trial procedures.’).

\(^{66}\) E.g. Scheduling Order, Prosecutor v. Gatete, Case No. ICTR-00-61-PT, TC III, ICTR, 11 August 2009, at 2 (decision taken by single judge under Rule 54).

\(^{67}\) For example, those described in infra nn 117-120 and the accompanying text.

\(^{68}\) Interview with Judge Erik Møse (n 65), at 4 (‘if you ask me, for instance, whether a pre-trial Judge should start imposing a limit on the number of witnesses at the pre-trial stage in order to streamline the case before the trial starts, I would adopt a cautious approach. The pre-trial Judge has limited knowledge of the case, compared to the parties. It is true that he or she can read the disclosures and the Prosecution pre-trial brief (usually a month before the trial starts). But it is a different matter to hear the evidence. … In my view, it is better for the bench to reduce the number of witnesses during the trial, if needed. An obvious reason for doing so, which the parties will usually understand, is that the evidence is getting repetitive.’). See also Letter dated 23 May 2007 from the President of the ICTR, Report on the Completion Strategy of the ICTR, UN Doc. S/2007/323, 31 May 2007, para. 20 (‘the Prosecution’s list of witnesses has usually been reduced during trial’).
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to testify.\textsuperscript{69} In fact, the Rule codified the pre-existing practice in the \textit{Akayesu} case.\textsuperscript{70} Furthermore, on 15 May 2004, the power to order the Defence to disclose the copies of written witness statements not only to the Chamber but also to the Prosecutor, was inserted,\textsuperscript{71} by analogy with the prosecution’s pre-trial disclosure of copies of the statements of witnesses whom it intended to call.\textsuperscript{72} It is noteworthy that the delivery to PTJ of copies of written statements by the parties prior to pre-trial and pre-defence conferences is not envisaged in ICTY Rule 65ter(E) and (G). But ICTY judges have occasionally requested access to witness statements prior to trial for the better comprehension of issues and a more effective management of the trial.\textsuperscript{73} At least since 2006, this has become a regular way to proceed.\textsuperscript{74}

The status regarding the judicial involvement in the pre-trial process at the SCSL had its own nuances. Essentially, the Court steered a middle course between the model variations embodied by each of the \textit{ad hoc} tribunals. While it inherited the ICTR Rules, the SCSL also benefitted from the bolder ‘managerial judging’ reforms at the ICTY when amending the Rules. Although the SCSL judges chose not to formalize the position of PTJ, they followed the ICTY’s legislative approach of requiring the submission of pre-trial briefs and accompanying material prior to the respective case-management conferences and granted themselves broader supervisory powers over charging than at the ICTR. At the same time, the SCSL RPE incorporated the formal power to request the parties to provide the Chamber in advance with written statements of each witness to be called at trial.

In November 2006, the SCSL plenary considered the proposal for creating PTJs and allowing them to rely on assistance of the Chambers’ legal officers, which was put forth by Antonio Cassese in his capacity as Independent Expert appointed by the UN Secretary-General to review the efficiency of the SCSL.\textsuperscript{75} Cassese suggested incorporating Rule 73\textit{quater} modeled upon Rule 65ter of the ICTY RPE.\textsuperscript{76} Nevertheless, the 8\textsuperscript{th} plenary meeting (21-24 November 2006) rejected that proposal. In his Report issued after the plenary, Cassese advised trial judges in the \textit{Taylor} case to take on the role similar to that provided under ICTY

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\textsuperscript{69} The ICTR’s 2000 annual report provides no specific explanation for the amendment, but indicates in general terms that the amendments falling within the reported period were adopted ‘with a view to expediting trials’: Fifth Annual Report of the ICTR, UN Doc. A/55/435-S/2000/927, 2 October 2000, para. 4.

\textsuperscript{70} Decision by the Tribunal on Its Request to the Prosecutor to Submit Written Witness Statements, \textit{Prosecutor v. Akayesu}, Case No. ICTR-96-4-T, TC, ICTR, 28 January 1997 (‘all such statements to which reference has been made by either the Prosecutor or the Defence shall be admitted as evidence and form part of the record.’).

\textsuperscript{71} Rule 73ter(B) ICTR RPE (29 May 2004).

\textsuperscript{72} Rule 66(A)(ii) ICTR RPE.

\textsuperscript{73} Order, \textit{Prosecutor v. Dokmanović}, Case No. IT-95-13a-PT, TC, ICTY, 28 November 1997 (‘the Trial Chamber will benefit from having access to Witness Statements and other documentary materials which will be relied on by the parties at trial and the production of Pre-Trial Briefs setting out the positions of the Parties; ... perusal of such documents by the Trial Chamber is primarily for the purpose of promoting better comprehension of the issues and more effective management of the trial; ... this material will not be regarded as evidence by the Trial Chamber unless and until submitted in the course of trial’); Scheduling Order, \textit{Prosecutor v. M. Kovačević}, Case No. IT-97-24-PT, TC, ICTY, 5 March 1998, at 2 (‘not less than twenty-one days prior to the commencement of the trial, ... the [Prosecution] shall submit to the Trial Chamber the statements of the witnesses it intends to call at that time and any other documentary material upon which it intends to rely at trial, it being understood that these statements and material shall not be used as evidence unless and until admitted by the Trial Chamber in the course of the trial’); Scheduling Order, \textit{Prosecutor v. Kupreškić et al.}, Case No. IT-95-16-PT, TC, ICTY, 20 May 1998, at 2 (\textit{ibidem}). Requiring the same, but for a different reason, see Order for Disclosure of Documents and Extension of Protective Measures, \textit{Prosecutor v. Kordić and Čerkez}, Case No. IT-95-14/2-PT, TC III, ICTY, 27 November 1998, at 2 (‘the Prosecution shall immediately provide to the Trial Chamber ... copies of the redacted statements provided to the Defence, together with unredacted copies for the purposes of review of the redactions for appropriateness’).

\textsuperscript{74} See accompanying text to \textit{infra} n 122.

\textsuperscript{75} Cassese SCSL Report (n 27), paras 104-5.

\textsuperscript{76} Suggestions for Consideration for the Plenary of Possible Amendments to the Rules of Procedure and Evidence of the Special Court, submitted on 23 October 2006 by Antonio Cassese, Independent Expert (‘Cassese Suggestions for Amendments’), at 17-8.
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Rule 65ter without a rule change, pointing out that Trial Chamber II had already relied on the assistance by the Deputy Registrar in managing some of the pre-trial meetings in that case.\textsuperscript{77} One reason for the SCSL judges’ turning down of the Cassese suggestion may have been reluctance to change the rules for one single case, since by the time the Cassese suggestions came in, the Taylor case was the only remaining case which still had a pre-trial judicial phase ahead.\textsuperscript{78} Secondly, at least some judges appeared to hold strong views about inappropriateness of entrusting such powers to non-judges,\textsuperscript{79} even thought this is usual in some common law jurisdictions.\textsuperscript{80} As will be explained below, this fits in the SCSL judges’ characteristically cautious attitude about the idea of managerial judging.

Regardless their decision not to introduce a PTJ figure, the SCSL judges have made a number of steps to reform the Rules concerning management conferences. While some of the amendments basically tracked the ICTR rule amendments, others had the effect of shifting the pre-trial framework closer towards the ICTY model. At the 3\textsuperscript{rd} plenary, on 1 August 2003, Rule 73\textsuperscript{bis}(A) was amended to specify that a pre-trial conference shall, rather than may, be held prior to the commencement of the trial, thereby aligning this provision with respective ICTY and ICTR Rules.\textsuperscript{81} The same sub-Rule was changed to allow a Judge designated from among its members, in addition to the Trial Chamber, to hold such a conference; the analogous amendment was introduced in SCSL Rule 73ter(A) governing pre-defence conference. On 29 May 2004, drawing upon similar ICTR amendments,\textsuperscript{82} the SCSL Trial Chamber or the judge were authorized to request: (i) the prosecutor to furnish the Chamber, prior to the pre-trial conference, with the copies of written statements of prosecution witnesses, and (ii) the defence to provide the Chamber and the prosecutor, before the pre-defence conference, with defence witnesses’ statements.\textsuperscript{83}

Next, on 13 May 2006, SCSL Rules 73bis(B) and (F) and 73ter(B) were amended, more in line with the ICTY this time, to authorize the Chamber or designated judge to order the prosecutor and the defence to file their pre-trial briefs (along with admissions and statements of contested matters of law and fact as well as witnesses and exhibits lists) not at the pre-trial conference and at the pre-defence conference respectively, but prior to those conferences.\textsuperscript{84} At the same plenary, the limit of ‘seven days prior to the date set for trial’ for the submission of the Defence pre-trial brief addressing the factual and legal issues and a statements of admitted facts and law was removed from Rule 73bis(F), to stipulate that the

\textsuperscript{77} Cassese SCSL Report (n 27), para. 105.
\textsuperscript{78} Interview with an SCSL Judge, SCSL-AJ-01, SCSL, The Hague, 16 December 2009, at 9 (‘When Professor Cassese made this report as an independent expert, ... pre-trials were virtually finished, one was starting, and I do not think it is right to start changing the goalposts and the playing rules when you have only one trial left. It is basically unfair to start changing rules for only one trial to go and all the other trials have be... for one of the trials had started.’).
\textsuperscript{79} Ibid. (‘I also have reservations about vesting judicial powers on a non-judicial person.’).
\textsuperscript{80} See e.g. Interview with a Legal Officer, SCSL Chambers, SCSL-AO-03, 23 October 2009, at 4 (‘when I worked in the United States, I would be on the phone with attorneys every day talking about cases. We would do scheduling orders and have a whole range of discussions with the parties. It does not make sense to me that legal officers are not involved in that sort of thing. They should, as the Judges do not have the time and the legal officer staff can do it. ... In my experience, it is absolutely essential. I used to work in complex civil litigation and we knocked matters out left and right simply by having the attorneys on the phone. These would be very complex cases that would take a long time, there were a thousand issues of dispute and the Judge’s entire goal was, for example, to go from a thousand issues to ten. Constant daily discussions and meetings and passing ideas back and forth and recommending that the parties have additional meetings themselves are absolutely necessary to the process. I think it really helps and makes a lot of sense.’).
\textsuperscript{81} Cf. Rule 73bis(A) ICTY RPE (IT/32/Rev. 13, 9-10 July 1998) and Rule 73bis (A) ICTR RPE (8 June 1998). In the first amended version of SCSL RPE (7 March 2003), Rule 73bis(A) departed from ICTR RPE in that it used the word ‘may’. None of the amendments introduced in Rules 73bis and 73ter at the 3\textsuperscript{rd} plenary meeting in London (28 July through 1 August 2003), are acknowledged in the text of the SCSL Rules.
\textsuperscript{82} See accompanying text to supra n 69
\textsuperscript{83} Rules 73bis(B) and 73ter(B) SCSL RPE (29 May 2004).
\textsuperscript{84} Cf. Rules 73bis(B) and (F) and 73ter(B) ICTR RPE.
defence may be ordered to file such documents ‘within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial’.  

Finally, on 26 November 2006, lit. (G) was added to SCSL Rule 73bis, envisaging the power of the Trial Chamber at any time to invite the prosecutor, in the interest of a fair and expeditious trial and after hearing the parties, ‘to reduce the number of counts charged in the indictment’ and ‘to determine a number of sites or incidents comprised in one or more of the charges made by the Prosecutor, which may reasonably be held to be representative of the crimes charged’.  

This heeded the recommendation by Independent Expert Cassese who was of the view that judicial moderation of charging activity, in particular, alternate and cumulative charging of crimes and modes of responsibility, enhanced the judges’ ability to control the proceedings.  

Obviously, the inspiration for this important addition was drawn from the respective ICTY amendment, even though the SCSL judges did not go as far as ICTY judges to grant themselves the power ‘to direct the Prosecutor to select counts on which to proceed’ contained in ICTY Rule 73bis(E).  

The meaning and effects of SCSL pre-trial reforms cannot be appreciated without insight into informal attitudes held by the judicial staff towards their managerial functions which has affected the actual practice. As mentioned above, many SCSL trial judges appear to have felt ambivalent about the managerial role they were expected to play. There is some evidence to support the claim that this cautious attitude may have to do with the judges’ backgrounds. The majority of SCSL judges come from a common law background, and in particular from Sierra Leone and other Commonwealth countries, which espouse a more ‘conservative’ version of common law than, for example, the US, England and Wales, or other countries amenable to the concept of a judge managing the case in the pre-trial.  

Indeed, explanations obtained by this author in the course of personal interviews with SCSL judge tend to reveal some uneasiness with the idea of a strong managerial role for judges. This is, among others, due to the perception that parties, rather than the judges, must be the real masters of their respective cases in an adversarial process.  

Thus, one SCSL judge agreed with the need to have powers enabling the court to moderate the scope of the case before it goes to trial, but qualified this statement by emphasizing that the power to limit the number of witnesses ahead of the trial should be exercise with utmost caution:  

I think it must be handled very carefully. A lawyer, particularly a defence lawyer, knows what evidence he wants to present in the defence of his client. I would be very careful, before hearing anybody speak, in starting to cut down witnesses. ... I am a believer that lawyers should be

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85 Cf. supra n 58 (ICTY deadlines) and Rule 73bis(F) ICTR RPE (still retaining the seven-day deadline).
86 Rule 73bis(G) SCSL RPE was introduced at the 8th plenary meeting (21-24 November 2006).
87 Cassese Suggestions for Amendments, supra note 76, at 16.
88 Fourth Annual Report of the President of the SCSL, at 24 (mentioning SCSL Rule 73bis(G) as one of the ‘most significant’ amendments).
89 See accompanying text to supra note 63.
90 Jørgensen, ‘The Proprio Motu and Interventionist Powers of Judges’ (n 27), at 124 (noting that the SCSL is ‘tilted towards common law procedures not so much by its procedural rules but as a consequence of drawing judges from Sierra Leone and other nations of the Commonwealth’); Interview with a Legal Officer, SCSL Chambers, SCSL-AO-01, 4 February 2010, at 2 (‘possibly it comes from the background of the judges who come from jurisdictions where it is up to the parties to make these sorts of decisions. Also they do not think court management is really their role and they may not have a lot of experience with it. It is unfortunate because in the Special Court of course there is a lot of pressure to do things in a timely way. But at the end of the day the judges are perhaps not used to that kind of role I think, and do not see it as part of their judicial function.’); Interview with a Legal Officer, SCSL Chambers, SCSL-AO-03 (n 78), at 3 (‘Most of the African judges come from systems that are similar to the English and American common law systems pre-1950 and are pretty formalistic. They never did the reforms we all did. To them, it would not have been immediately apparent that they should have done a lot of pre-trial managing because that is not part of their law, and they just never had the opportunity to learn in practice.’).
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given a certain amount of professional freedom to work out what witnesses they need. The judges should only start interfering when it becomes repetitious or goes away from the subject matter, which is in the charges.  

In a similar vein, while acknowledging that ‘the judges should be able to control the number of witnesses that a party calls’, another SCSL judge pointed out the difficulty of meaningfully exercising this power in the absence of detailed knowledge of the case:

Do I tell the prosecutor: ‘Ok, you have 200 witnesses lined up please cut them down to 100’? He will ask me: ‘Based on what?’ I did not read the dossier, I have no idea but I know that he has the burden of proof, I know he has to prove a number of elements and in his wisdom these are the witnesses he needs to prove his case. Because I will be the first to turn around and say that he did not prove his case beyond reasonable doubt. And it is the same thing with the defence. Often we had pressure put on us as judges, that we must control the parties. The defence does not have the burden of proof, but they are proposing to call so many witnesses, what was said to be unnecessary. Now you see: who has to judge what is necessary and what is unnecessary? The accused is telling you: ‘Yes I do not have the burden of proof but I am the one on trial here, this is my case I have a right to state my case and my case entails 100 witnesses.’

The version of judicial managerialism endorsed by these SCSL judges is based on a light-touch and reactive approach to oversight over the parties’ cases, allowing them to police only obvious and unjustifiable excesses. It falls short of micro-management or pro-active approach of setting stringent limits for the party presentation. That this laidback attitude with regard to case-management had influence on the SCSL trial practice has been confirmed by legal officers in the Chambers, when asked to assess the judges’ performance in this respect. Some expressed the view that it would have been better for the SCSL judges to be more active in the pre-trial phase, by focusing the cases in advance, as well as by ensuring the relevance of evidence in the course of the hearing.

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91 Interview with an SCSL Judge, SCSL-AJ-01 (n 78), at 5.
92 Interview with an SCSL Judge, SCSL-AJ-02, SCSL, 9 December 2009, at 6.
93 See e.g. ibid. (‘So within reason yes, the judges can control and our basis or our guidance for controlling is the expeditiousness and fairness of the trial. … This is the kind of control we exercise as judges without really putting undue fetters, without fettering the parties. We try to conduct a fair and expeditious trial within limits. But it is never easy for a judge to put down numbers just like that, randomly: ‘You call so many witnesses, you do not need so many witnesses, call so many’. How do I know what the defence case is, they do not give us a prior indication. Yes, I can ask how many witnesses they intend to call and they must tell me. Now having told me they are going to call 50 witnesses, if they suddenly say that they want to call another 20, I will be very serious and why is that? Because they are supposed to be certain when I ask them in the first place! You know that helps everybody to plan. We will control and manage the trial but only where it is in the interest of a fair and expeditious trial do we intervene.’).
94 Interview with a Legal Officer, SCSL Chambers, SCSL-AO-01 (n 90), at 2 (‘to a certain extent they [judges] are much less willing to intervene and establish strict time limits for when parties have to do things. Also they prefer that the parties make submissions rather than imposing conditions on them. … When the parties make submissions, the judges are reluctant to limit the time for submissions or to cut the parties off. Also, generally if the parties ask for extensions in time, these are usually granted. The judges do not like interfering with submissions, whereas if they could streamline a lot of these submissions, that might save time and narrow the issues.’); Interview with a Legal Officer, SCSL Chambers, SCSL-AO-02, 16 December 2009, at 4 (‘the Judges were not active at the pre-trial stage, for example, through pre-trial discussions, focusing the case, etc. They basically left everything to the parties. … I think that the Judges could have done a bit more in relation to pre-trial management in order to focus the parties and actually narrow down some of the issues.’).
95 Interview with a Legal Officer, SCSL Chambers, SCSL-AO-04, 21 October 2009, at 2 (‘You wind up with a lot of time spent on bringing in evidence that ends up not going to the proof of facts in the case. That really comes down to the role of the Judges. It comes down to a Judge not playing an active role as a gatekeeper and asking about the relevance of evidence at every turn. … Judges can and could have intervened and asked questions that determined whether that witness was testifying on a point relevant to the indictment or not. That was not done as often as it should have.’).
Now that the nature and chronology of reforms in the pre-trial process has been overviewed, it is possible to look into whether and to what extent they may have impacted on the normative role of trial phase in international criminal proceedings. In this context, the ICTY institute of PTJ deserves particular attention, given that this judge is tasked with collecting, and has access to, the parties’ evidence in the pre-trial stage, which might or might not involve the analysis of evidence on the merits. Albeit in lesser detail, the relevant functions of case-management conferences should be considered because they imply a degree of familiarity with the parties’ cases ahead of the trial on the part of the trial bench.96

3.2.2 Pre-trial judge (ICTY)

According to one interpretation, the institute of pre-trial judges appeared in the ICTY system as ‘an attempt to resolve as much of the disputed territory between the parties as possible prior to the trial phase of the proceedings’.97 In specific terms, the PTJ is responsible for the smooth conduct of pre-trial process in the preparation for the pre-trial and pre-defence conferences (Rules 73bis and 73ter of the ICTY, ICTR, and SCSL RPE). Under the authority and supervision of the Trial Chamber, PTJ coordinates communication between the parties before the trial, ensure that the proceedings are not unduly delayed, and take measure necessary to prepare the case for a fair and expeditious trial.98 PTJ’s mandate is broadly formulated and potentially far-reaching, rendering its holder a key player in the process of shaping the case for trial. As noted above, the consistent tendency for PTJ role has been steady expansion.99 Initially entrusted with all or part of pre-trial functions set forth in Rules 73, 73bis, and 73ter,100 PTJ was subsequently granted powers under Rule 66101 and Rule 67.102 Further, PTJ’s role in the preparation of pre-trial and pre-defence conferences was expanded and the capacities at PTJ’s disposal enhanced by enabling the judge to rely upon the support by Senior Legal Officers (SLO) in facilitating the discussions between the parties.103 Reportedly, the PTJs have also exercised powers in areas not explicitly provided for in the Rules, but falling within their general authority under Rule 65ter(B).104

The principle regarding the division of labour between PTJ and the Trial Chamber is that the former works with the parties to ensure timely disclosure, collect the pre-trial materials from the parties for the Chamber’s review, and to resolve pending matters in the anticipation of pre-trial conferences. But most of the substantive issues—e.g. deciding on preliminary motions under Rule 72 and exercising managerial measures on the parties’ cases such as by determining the number of witnesses to be called by the parties and setting the time available for the presentation of the case—remain the responsibility of the Chamber.105 PTJ records the points of agreement and disagreement on matters of law and fact between the

96 On conferences in detail, see Chapter 8, section 3.2.3.
98 Rule 65ter(B) ICTY RPE.
100 Cf. Rule 65ter(D) ICTY RPE (IT/32/Rev. 13, 9-10 July 1998).
102 Cf. Rule 65ter(C) ICTY RPE (IT/32/Rev. 29, 12 December 2003).
103 Cf. Rule 65ter (E)-(G) ICTY RPE (IT/32/Rev. 17, 17 November 1999); Rule 65ter(D) ICTY RPE (IT/32/Rev. 20, 12 April 2001).
105 ICTY Manual on Developed Practices (n 27), at 61, para. 32.
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parties and orders them to file written submissions. Furthermore, PTJ keeps the Chamber regularly informed as to the issues in dispute and may refer such disputes to it. Thus, the workload on PTJ is fairly significant.

As a result of a series of adjustments of Rule 65ter(A), the assignment of PTJ to the case is done no later than 7 days after the initial appearance of the accused. PTJ is designated by the President of the Trial Chamber from among its members. This ensures that PTJ can actively engage with issues anticipated to be material for the scope of the case, rather than leave their resolution to the Trial Chamber. The advantage of appointing a trial bench member as a PTJ is that this enables the PTJ to take effective measures towards reducing the scope of the prosecution case prior to pre-trial conference, or to prepare ground for such decisions at the conference.

Rule 65ter—one of the most elaborate ICTY rules—sets out the functions of the pre-trial Judge, of which those most relevant in the context of this discussion are set out below. Firstly, in accordance with Rule 65ter(C), PTJ determines and enforces time-limits for disclosure by the parties of the materials pursuant to Rules 66(A)(ii) and 67(B). Like the full Chamber, PTJ has the power, acting on its own motion or upon request of a party, to impose sanctions on the party who fails to perform its disclosure obligations. Second, PTJ is to establish the work plan including the deadlines to be met by the parties in the course of trial preparation and supervises the implementation of that plan, normally through the

106 Rule 65ter(H) ICTY RPE.
107 Rule 65ter(J) ICTY RPE.
108 Bonomy, ‘The Reality of Conducting an International Criminal Trial’ (n 38), at 354 (noting in relation to PTJ’s growing powers that ‘a great deal is expected of a pre-trial Judge who diligently undertakes his responsibilities’).
109 Rule 65ter(A) ICTY RPE. The initial version of the Rule (IT/32/Rev. 13) did not stipulate the time limit for designation of the PTJ. On 17 November 1999, it was amended, as agreed during the 21st plenary session, to provide that PTJ must be designated no later than 60 days from the initial appearance. See Seventh Annual Report of the ICTY, UN Doc. A/55/273-S/2000/777, 26 July 2000, paras 288-9 (‘Many of these amendments were intended to speed up trials and the pre-trial process and to minimize delays … [and] to improve pre-trial management’). With the 12 April 2001 amendment, the delay for PTJ appointment was reduced to 7 days and a reference to ‘permanent members’ of the Chamber was added (precluding ad litem judges from being designated as PTJ): see Rule 65ter(A) ICTY RPE (IT/32/Rev. 16). On 17 July 2003, this limitation was removed: see Rule 65ter(A) ICTY RPE (IT/32/Rev. 28). This amendment was approved at the 28th plenary session, held in July 2003, in accordance with the UNSC Resolution 1481 (2003), expanding the power of ad litem judges to undertake pre-trial work. See Ninth Annual Report of the ICTY (n 61), para. 34 and Chapter 3, section 5.
110 ICTY Manual on Developed Practices (n 27), at 61, para. 30 (‘Ideally, the Pre-trial Judge will be the same Judge that presides over the case at trial, or who is at least a member of the trial bench, thus permitting the Judge to have more “ownership” during the pre-trial proceedings, and thus to make decisions that will impact [on] how the trial will be conducted’). See also ibid., para. 32 (in the ICTY practice, it was not always feasible to have PTJ also serve as a Judge of the Trial Chamber, but in that case the PTJ ‘may be reluctant to bind [his] colleagues who will hear the case by making pre-trial decisions on critical matters affecting the management of the trial itself’). For a recommendation to the same effect, see Harmon, ‘The Pre-trial Process at the ICTY’ (n 51), at 390.
111 ICTY Manual on Developed Practices (n 27), at 61, para. 30 (the ICTY TC may request the Prosecutor to reduce its witness list, or limit the total estimated length of examination in advance of the pre-trial conference).
112 Pursuant to Rule 66(A)(ii) ICTY RPE, the prosecutor shall make available to the defence in a language which the accused understands, within the limit prescribed by the TC or PTJ the copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial and copies of all transcripts and written statements taken in accordance with Rules 92 bis, 92 ter, and 92 quarter. Copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call these witnesses. In accordance with Rule 67(B), the defence will notify the prosecutor of its intent to offer the defence of alibi, along with the relevant details; any special defence, including that of diminished or lack of mental responsibility; and the prosecutor shall notify the defence of the names of the witnesses the prosecutor intends to call to rebut any defence plea previously notified to it.
assisting SLO. For that purpose, PTJ orders the parties to meet amongst themselves and/or convene with SLO in the so-called ‘Rule 65ter conferences’, to discuss their filing obligations prior to the pre-trial or pre-defence conferences. At that point, the relevant deadlines can be monitored and issues not genuinely in dispute identified. This power has been given teeth by empowering the Trial Chamber, upon a report of the PTJ, to sanction a party failing to perform its obligations related to the work plan, including the possible exclusion of testimonial or documentary evidence.

Third, PTJ carries out functions delegated by the Chamber, for example, compiling and submitting to it the file in the case for the purpose of the pre-trial conference and a similar file before the pre-defence conference.

This latter duty was added by the major amendment dated 17 November 1999, whereby formal admissions and stipulations on disputed and uncontested matters of law and fact were made part of the work plan to be set and executed by PTJ in Rule 65ter meetings, while originally (from July 1998) it was the responsibility of the Chamber under Rules 73bis and 73ter. The reason for expanding PTJ’s powers and for making pre-trial submissions part of Rule 65ter procedure was to enable that judge ‘to better manage the pre-trial stage of proceedings in an attempt to shorten the length of trials and speed up proceedings [and] to narrow down the matters in issue in the trial, enabling the trial chamber to have an effective overview of how the parties will conduct their case, what the real issues are going to be and the anticipated length and size of the case.’

As a result, the parties were imposed obligations to make extensive filings to PTJ before the case-management conferences. In particular, upon receipt of the SLO report, the PTJ shall order the prosecutor to submit, within a prescribed time limit and not less than 6 weeks before the pre-trial conference: (i) the final version of the prosecution’s pre-trial brief, including, for each count, a summary of the evidence which the prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility; any admissions by the parties and statements of both undisputed and contested matters of fact and law; (ii) the list of witnesses and exhibits with detailed information – among which, for witnesses, a summary of the facts on which each witness will testify, specific references to the counts of the indictment, the total number of witnesses testifying in the case and against each accused and on each count, the modality of testimony, and the estimated length of time required for each witness as well as the total time.

In 2006, the Working Group on Speeding Up Trials, whose aim was to identify ways to boost the efficiency of PTJ in expediting pre-trial process, delivered a report recommending the fuller use of PTJ competences. Drawing guidance from that proposal, the judges adjusted their Rule 65ter practice yet again, without amending the rule though. In particular, as mentioned, they started requesting the prosecution to disclose to both the defence and PTJ the copies of witness statements, as opposed to their summaries, and in final version, as opposed to statements taken during investigation. Absent the rule concerning the delivery of full statements to PTJ, over and above defence disclosure pursuant to Rule 66(A)(ii), the WG recommended PTJs to invoke the catch-all provision of Rule 65ter(B). The delivery of full statements was expected to ‘substantially increase the prospect of identifying

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114 Rule 65ter(D) ICTY RPE. On Rule 65ter meetings, see Chapter 8, section 3.2.3.B.
115 Rule 65ter(N) ICTY RPE (added on 12 April 2001).
116 Rule 65ter(L) ICTY RPE.
117 Cf. Rule 65ter(E) and (F) ICTY RPE (IT/32/Rev. 17, 17 November 1999).
118 Boas, ‘Creating Laws of Evidence’ (n 97), at 87.
119 Rule 65ter(E)(i) ICTY RPE.
120 Rule 65ter(E)(ii)-(iii) ICTY RPE.
121 ICTY Completion Strategy Report of May 2006 (n 104), para. 26 (the WG’s proposal was for PTJs to make a ‘full and imaginative use of the extensive powers available to them, to the extent that that can be done without infringing the rights of the accused’).
122 Ibid., para. 21.
the real points at issue prior to the commencement of the trial’ as well as enable the PTJ to narrow the issues in dispute.\textsuperscript{123} Further to that, PTJs reportedly adopted the WG’s recommendation to review all statements and documents which the prosecution intends to present in court, in order to be able to urge it to focus on the stronger parts of the case and even take ‘hard decisions’ regarding the length of the prosecution case.\textsuperscript{124}

After the prosecutor’s submission under Rule 65\textsuperscript{ter(}E\textsuperscript{)}, PTJ orders the defence, within a certain time-limit but not later than 3 weeks before the pre-trial conference, to file a pre-trial brief including a statement of the nature of the accused’s defence, the matters with which the accused takes issue in the prosecutor’s pre-trial brief and the reasons for disagreement.\textsuperscript{125} PTJ then submits to the Chamber a complete file consisting of all filings of the parties, transcripts of the status conferences, and minutes of Rule 65\textsuperscript{ter} meetings, for consideration and decision to be made on it at the pre-trial conference.\textsuperscript{126}

The fourth major segment of PTJ’s work, next to the above-mentioned duties, relates to the intermediary period after the prosecution rests its case and prior to the commencement of the defence case. Then PTJ comes back into play in order to prepare the defence case for managerial review at a pre-defence conference. For that purpose, PTJ shall order the defence to file a list of its proposed witnesses along with the relevant particulars and a list of exhibits.\textsuperscript{127} Upon receiving these materials, the PTJ submits a second file to the Trial Chamber as a material for the purpose of the Pre-Defence Conference.\textsuperscript{128}

Finally, PTJ may also exercise all or part of functions stipulated in Rule 73, i.e. the consideration of pre-trial motions, not being preliminary motions challenging jurisdiction, alleging defects in the form of the indictment, seeking severance of counts or trials, or raising objections to the refusal to assign counsel.\textsuperscript{129} Such other motions include requests for provisional release, protective measures for witnesses, motions for joinder and severance of cases, prosecution motions to amend the indictment, and motions for access to confidential materials in other cases.\textsuperscript{130} Besides that, the pre-trial Judge sets the time frame for the submission of the pre-trial motions and any hearings thereon.\textsuperscript{131}

Despite the importance of PTJ’s role and the extensive terrain of duties forming part of PTJ’s authority, it is clear that none of PTJ’s competences at the ICTY (or, for that purpose, similar competences of a designated judge at the ICTR and SCSL) enables him or her to conduct an inquiry into the facts alleged by either party and foreshadow the full Trial Chamber’s consideration of the case on the merits. While the PTJ has access to prosecution evidence before trial and to defence evidence prior to the defence case, it is certainly not a part of PTJ’s formal mandate to scrutinize the contents of such partisan materials. Nor do PTJ’s functions enable her to form an early opinion on the substance based on the evidence she may be exposed to, let alone to convey any such opinions to the other members of the bench. Indeed, the objection can be made that PTJ may still prejudge the merits of the case and even improperly influence her colleagues in the Trial Chamber, particularly where she is expected to recommend the prosecution to focus on the ‘stronger parts’ of the case. Admittedly, such an expectation, combined with the fact that PTJ then sits as a member of the trial bench, might give rise to tensions or a taint of impartiality.\textsuperscript{132} If that fear is justified, PTJ’s access to partisan information might arguably reduce the exclusivity of the trial as the

\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid., para. 22.
\textsuperscript{125} Rule 65\textsuperscript{ter(F)} ICTY RPE.
\textsuperscript{126} Rule 65\textsuperscript{ter(L)(i)} ICTY RPE.
\textsuperscript{127} Rule 65\textsuperscript{ter(G)} ICTY RPE.
\textsuperscript{128} Rule 65\textsuperscript{ter(L)(ii)} ICTY RPE.
\textsuperscript{129} Rule 65\textsuperscript{ter(C)} ICTY RPE.
\textsuperscript{130} ICTY Manual on Developed Practices (n 27), at 64-6.
\textsuperscript{131} Rule 65\textsuperscript{ter(K)} ICTY RPE.
\textsuperscript{132} See further Chapter 8.
proof-taking forum. However, the counterargument is that PTJ is not the only judge on the trial bench. The intensity of any possible prejudgment on her part, just as her willingness or ability to shape the opinions on the evidence of other judges, who are to sit through a lengthy trial in hearing the evidence anew, should not be presumed or overstated. From a normative perspective, both in law and in theory, the position of PTJ is not of such a nature as to cast a shadow on the position of the trial phase and detract from its significance as the central venue of truth-finding in the proceedings.

3.2.3 Case-management conferences

As noted above, in contrast with PTJ, pre-trial and pre-defence conferences are institutions shared by the ICTY, ICTR, and SCSL.\(^{133}\) The purpose of these conferences is to enable judicial moderation of the scope of the forthcoming case by limiting the time for the presentations and the time for the examination-in-chief of witnesses, reducing and setting the number of witnesses each party is allowed to call, and by reducing the scope of the charges. As a consequence of asymmetrical rule amendments, as described earlier, the managerial judging regimes in the ICTY, ICTR, and SCSL are fragmented somewhat: as a matter of formal rules, the functions of the conferences differ between the ICTY and SCSL, on the one hand, and the ICTR, on the other.

At the ICTY, the collection of parties’ pre-trial briefs, witness and exhibits lists, and admissions and statements of disputed matters is done by PTJ in advance of pre-trial and pre-defence conferences, whereas at the ICTR and SCSL, it is formulated as a function exercised by the Chamber or designated judge in the framework of such conferences. Hence, before the ICTY the administrative work done by PTJ earlier in the process was more detached from the substantive management responsibilities of the Chamber. Similarly, SCSL Rules 73\textit{bis}(B) and (F) and 73\textit{ter}(B), as amended on 13 May 2006, formally authorized the Chamber or Judge to order the parties, prior to pre-trial or pre-defence conference, to file pre-trial briefs, admissions and statements of contested matters and to the prosecution to file its witness and exhibits lists within the certain time limit and before the date set for trial.\(^{134}\) Previously, Rule 73\textit{bis} was interpreted as providing for prosecution filings after the conference, so the Trial Chamber cited Rule 54 in addition to Rule 73\textit{bis}, in ordering the OTP to file the brief at an earlier stage.\(^{135}\) By comparison, the Taylor Chamber requested prosecution materials in advance of the conference as a matter of course.\(^{136}\) By contrast, ICTR provisions on pre-trial conferences are less specific and give rise to an interpretation that these meetings are reserved for administrative matters such as the issuance of orders to file pre-trial materials.\(^{137}\) Where the court does not have access to pre-trial materials in advance of the conferences, it may be prevented from exercising its case-management powers and discussing with the parties any follow-up issues at an early stage, leaving this for the period after the conference and for trial. However, its completion strategy reports, the ICTR consistently assured that the trial

\(^{133}\) Rules 73\textit{bis} and 73\textit{ter} ICTY, ICTR, and SCSL RPE.

\(^{134}\) See supra n 84.

\(^{135}\) Order for Filing Pre-Trial Briefs (Under Rules 54 and 73 \textit{bis}), \textit{Prosecutor v. Brima et al.}, Case No. SCSL-04-16-PT, TC, SCSL, 13 February 2004 (‘Rule 73 \textit{bis} … provides for the filing of a pre-trial brief … at a time after the Pre-Trial Conference … [T]he right of the Accused to a fair and expeditious trial will be advanced by the filing of the pre-trial briefs at an earlier stage in the pre-trial process than after the Pre-Trial Conference’); Order for Filing Pre-Trial Briefs (Under Rules 54 and 73 \textit{bis}), \textit{Prosecutor v. Sesay et al.}, Case No. SCSL-04-15-PT, TC, SCSL, 13 February 2004.

\(^{136}\) Scheduling order for a pre-trial conference pursuant to Rule 73 \textit{bis}, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-1-PT, TC II, SCSL, 2 February 2007, at 2-3 (ordering to file the prosecution pre-trial brief along with accompanying materials on or before 4 April 2007, the defence pre-trial brief and a statement of admitted facts and law on 26 April 2007, while the pre-trial conference was scheduled for 7 May 2007).

\(^{137}\) Rule 73\textit{bis} (B), (F) and 73\textit{ter}(D) ICTR RPE.
chambers had effectively used the conferences ‘to streamline trial proceedings and identify with the parties issues to be resolved’ as a way to improve ‘trial-readiness’. 138

Another set of differences between the courts flows from the varying scope of powers to be exercised by the chambers during or after the respective conferences. First, at the ICTR and SCSL, judges are formally empowered to request the copies of witness statements, while the ICTY judges are not. 139 The possibility of perusing full statements enables the bench to obtain a more detailed knowledge of the forthcoming case and more assertively moderate it, for example, by estimating the reasonable length of examination-in-chief and the time for the presentation. However, despite the absence of a formal power from the ICTY Rules, the ICTY judges, as noted, have requested the submission of witness statements before trial, which renders the difference a matter of formality rather than practice.

Secondly, in the lead up to at the pre-trial conference, the Trial Chamber (or designated Judge at the ICTR and SCSL) may, on the basis of the prosecution materials, 140 ‘call upon’ (ICTY) or ‘order’ (ICTR/SCSL) the prosecutor to shorten the examination-in-chief of some witnesses. 141 The power to order may be a corollary of the authority of ICTR and SCSL judges to obtain the copies of written statements. At the ICTY, the Chamber ‘shall determine’ the number of witnesses to be called by the Prosecutor and the time for presenting evidence, while at the ICTR and SCSL it ‘may order the Prosecutor to reduce’ the number of witnesses, if it considers that an excessive number of witnesses are called to prove the same facts, and ‘may order the Prosecutor to shorten the examination-in-chief of some witnesses.’ 142 The divergent formulation of analogous powers shows at the ICTY and the ICTR (and SCSL) may mean that the ICTY judges are expected to take a more pro-active and autonomous approach in managing the prosecution case, while their colleagues at the ICTR and SCSL will be reactive and intervene when the proposed evidence is superfluous.

Third, the moderation of the prosecutor’s charging activity is the competence that may be exercised at the pre-trial conference by the ICTY and SCSL judges, but not their ICTR counterparts. In the former courts, the Trial Chamber may ‘invite’ the prosecution, after having heard it, to reduce the number of counts charged in the indictment and it may fix a number of crime sites or incidents comprised in one or more of the charges which may reasonably be held to be representative of the crimes charged. 143 Furthermore, at the ICTY the Trial Chamber may, after having heard both parties, ‘direct’ the prosecutor to select the counts on which to proceed. 144 There is no match to this far-reaching—and controversial—power in the arsenal of the ICTR and SCSL judges. 145

As for pre-defence conferences, these pursue the analogous goal of reducing the length of scope of the defence case. Based on the second file of PTJ (ICTY), or defence materials

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139 Supra nn 69 and 83.
140 See Rule 65ter(E) and (L)(i) ICTY RPE; Rule 73bis(B) ICTR and SCSL RPE and text to supra n 120. Prosecution materials are followed by the defence response consisting of pre-trial brief (Rule 65ter(F) ICTY RPE and Rule 73bis (F) ICTR and SCSL RPE and text to supra n 125).
141 Cf. Rule 73bis(C) ICTY RPE with Rule 73bis(C) ICTR and SCSL RPE.
142 Cf. Rule 73bis(D) ICTY RPE with Rule 73ter(C) and (D) ICTR and SCSL RPE. As per Rule 73bis(F) ICTY RPE and Rule 73bis(E) ICTR and SCSL RPE, the Prosecutor may move the Chamber for leave to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called after the commencement of the trial.
143 Rule 73bis(D) ICTY and Rule 73bis(G) SCSL RPE. Rule 73bis(F) ICTY RPE allows the prosecution after the trial commences to file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented.
144 Rule 73ter(E) ICTY RPE. Such decisions may be appealed by a party as of right.
145 For discussion, see Chapter 8.
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(ICTR and SCSL), the defence may be ‘called upon’ (ICTY) or ‘ordered’ (ICTR/SCSL) to shorten the estimated length of the examination-in-chief for some witnesses. After having heard the defence, the Trial Chamber shall ‘set the number of witnesses the Defence may call’ (ICTY) or ‘may order’ it to reduce the number of witnesses should an excessive number of them be called to prove the same fact (ICTR/SCSL). Finally, the ICTY Trial Chambers are uniquely required to determine at the Pre-Defence Conference the time available to the Defence for presenting evidence, which may be extended during trial in the interests of justice if the Defence so requests.

The overview of the activities comprised within pre-trial and pre-defence conferences makes clear that the principal purpose of pre-trial process at the ICTY, ICTR and SCSL is to enable the judges to keep the volume of the cases that go to trial within reasonable limits. They may do so on three levels: (i) identifying the issues truly in dispute; (ii) reducing the evidence to be heard at trial and avoiding repetitive testimony; and (iii) narrowing the charges (ICTY and SCSL). Despite the differences mentioned, conferences pursue the same broad goal of assisting judges in the proactive trial management. This task is facilitated by putting at their disposal a ‘proto-dossier’ – a compilation of information from the parties giving the judges a general idea about their case. Due to the partisan nature of such material, the comparison with the inquisitorial dossier containing evidence collected through official inquest is inaccurate and misleading. This ‘proto-dossier’ is not evidence but a case-management tool – it is not relied upon for the purpose of establishing the facts or truth-finding.

As pointed out in relation to the role of PTJs, managerial and fact-finding aspects of the judicial role are not always distinguishable as there may be a degree of confluence between them. The Chamber with prior access to the written statement may rely on its knowledge about the contents of forthcoming testimony to participate more actively at trial by correcting the course of testimony or by asking questions, thereby performing as an engaged truth-seeker. Some scholars have criticized the notion of pre-trial access by the judges to the untested partisan information from a human-rights perspective because the prejudicial nature of such (prosecution) materials may undermine judicial impartiality.

For instance, Megan Fairlie deemed problematic the way in which the Dokmanović judges used the witness statements they had obtained at trial. She took issue with the fact that Judge Cassese had indicated in advance what period in the narrative of the witness is of ‘most concern’ to the court. She argued that such ‘steering’ of the prosecution by the bench in a specific direction created ‘an unfair advantage’ in the contest between the parties, since ‘the Court has drawn conclusions based upon its reading of the material, rather than neutrally receiving the same and withholding judgement until collegial decision-making’.

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146 Rule 65ter(G) ICTY RPE; Rule 73ter(B) ICTR and SCSL RPE.
147 Rule 73ter(B) ICTY RPE; Rule 73ter(C) ICTR and SCSL RPE.
148 Rule 73ter(C) ICTY RPE; Rule 73ter(D) ICTR and SCSL RPE. In all three tribunals, the list of witnesses may be reinstated or the decision as to which witnesses are to be called may be varied: see Rule 73ter(E) ICTY RPE; Rule 73ter(E) ICTR and SCSL RPE.
149 Rule 73ter(E) and (F) ICTY RPE.
150 Langer, ‘The Rise of Managerial Judging’ (n 40), at 890 (‘the goals of [the court’s] activism is not to be an active investigator of the truth, but an active manager who tries to expedite and simplify the court’s case’) and 898 (‘given that judges have needed more information mainly to become active expediting managers rather than active investigators, the introduction of these proto-written dossiers is much better described … as a managerial judging reform’); Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 37), at 445 (‘The presentation of pre-trial briefs and witness and exhibit lists is not comparable to the creation of the dossier typical to the civil law tradition. The briefs give general information on the cases of the parties, but the exact content of the evidentiary materials … remains unavailable to the pre-trial Chamber. In this way, the clear-cut distinction between mere “information” and proper “evidence” is preserved.’).
151 Fairlie, ‘Revised Pre-Trial Procedure’ (n 39), at 320.
153 Fairlie, ‘Revised Pre-Trial Procedure’ (n 39), at 320.
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given that it was a historian expert witness and that the prosecution examined that witness in chief without interruption, the prejudice is arguably overstated.

Moreover, the criticism appears to be premised upon an objection against the ‘managerial model’ in light of the undiluted adversarial model, since it entails that judges should not use their knowledge of the case in order to focus evidence which is a legitimate managerial goal. It should be noted that prior knowledge of the case does in itself conflict with the principle of judicial impartiality. As held by the European Court of Human Rights,

the mere fact that a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial. Likewise, the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudged.

Like with the institution of PTJ, the various conferences held in the pre-trial serve the aim of confining the evidence at trial to that necessary for adjudicating the case. Directing the course of evidentiary presentations does not imply or lead to pre-judgement of the merits of the evidence on the part of the judges. Rather, it falls within their duty to ensure that the evidence heard is relevant to the case and that its presentation is conducive to the ascertainment of the truth. Hence, there is a thin yet principled line between the truth-finding and managerial sides of the judicial mandate. Pre-trial conferences and other forms of trial-preparation are not meant to win over the truth-finding function in respect of the question of guilt or innocence from the trial process. Among others, pre-trial judicial process operates as a filter by which the court sifts out the proposed evidence and issues of fact and law which in fact do not warrant time-investment at trial because they are irrelevant, superfluous, or not genuinely disputed by the parties. The exercise of managerial powers does not, and should not, amount to a consideration of the case on the merits that could overshadow the substantive deliberations and decision at the end of the trial.

3.2.4 Preliminary motions

The other function of the ICTY, ICTR, and SCSL pre-trial process deserving brief mention in this context is the disposition of various preliminary motions. As opposed to all other motions (Rule 73), preliminary motions concern: (i) jurisdiction; (ii) defects in the form of the indictment; (iii) severance of counts joined in one indictment under Rule 49 or separation of trials under Rule 82(B); (iv) refusal of a request for assignment of counsel made under Rule 45(C); and, at the SCSL, (v) abuse of process. Considering this type of motions in the light of the question whether, as a part of the pre-trial process, their resolution has effects on the trial, such impact cannot be denied.

While the need to dispose of these motions will result in delays before the commencement of trial, this ultimately serves to streamline and ensure the smooth conduct of

154 Transcript, Prosecutor v. Mrkić et al. (n 152), at 171-211.
156 Rules 89(C) and 90(F) ICTY, ICTR, and SCSL RPE.
157 Rule 72(D) ICTY and ICTR RPE (defining such motions as those challenging an indictment on the ground that it reaches beyond the personal, territorial, temporal, and material jurisdiction).
158 Rule 72(A) ICTY and ICTR RPE; Rule 72(B) SCSL RPE. At the ICTY and ICTR, such motions shall be brought not later than 30 days after prosecution disclosure under Rule 66(A)(i) and disposed of not later than 60 days after filing and before the opening statements. Rule 72(D) SCSL RPE states that preliminary motions should be disposed of prior to trial, except where they are referred to the AC as engaging a serious issue relating to jurisdiction under Rule 72(E) or an issue significantly affecting the fair and expeditious conduct of the proceedings and the outcome of a trial under Rule 72(F) SCSL RPE.

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the trial hearings. Otherwise, the court would have been required to draw resources and time from the core trial business of hearing and analysis of evidence to the resolution of preliminary issues. Secondly, preliminary motions regarding jurisdiction are intended to test legal grounds for holding the trial: a successful challenge of jurisdiction might result in having no trial at all and discontinuance of the proceedings. Thirdly, joinder and severance are essential case management techniques and, therefore, the respective preliminary motions potentially have effects on the length and format of the trial.159

While the potential effects on the trial are thus evident, the decisions on preliminary motions of course do not supplant its proper functions. Even where they determine the possibility of holding a trial, it is not their rationale to establish the alleged facts or to find the truth regarding the guilt or innocence of the accused. Therefore, it is difficult to see how they may present a ‘normative attack’ on the trial or challenge its centrality in the structure of proceedings.

3.3 ICC: Pre-Trial Chamber and confirmation of charges

3.3.1 Pre-Trial Chamber

The discussion of the pre-trial regime of the ad hoc tribunals explains sufficiently the relation of the judicial case-management competence to functions typically associated with the trial phase. As mentioned previously and as will be discussed in detail in a later chapter, the architects of the ICC procedural model drew upon the experiences of the ad hoc tribunals, in that the elements of managerial judging concept became part of the ICC procedure and powers of the ICC trial judges, provided for in the Rules and Regulations of the Court. The ICC Trial Chambers have powers to determine the form in which the case reaches the stage of the trial proper. The consideration that managerial judging is not meant to hijack the fact-finding prerogatives of the trial court and thus does not affect the centrality of the trial as the procedural stage applies equally to the ICC. The managerial side of the ICC judiciary will therefore not be considered here. Instead, the section will address other features found in the ICC process that might be taken to threaten the status of trial as the principal truth-finding locus. Among other significant advances, the ICC procedural model distinguishes itself by a number of novel elements in the design of pre-trial process that are relevant to this discussion, including the Pre-Trial Chamber (PTC) and the confirmation of charges procedure.

In a sense, PTC is the culmination of the trend towards institutionalized pre-trial judicial function in international criminal procedure. The creation of the Pre-Trial Chamber that is fully separate from the trial court and is tasked with functions exercised exclusively in the pre-trial framework, can be perceived as consummating the ICTY’s development in consolidating the pre-trial judicial function embodied in PTJs. However, the rationales behind the two pre-trial units and their mandates are so distinct that the label ‘pre-trial’, indicating their shared domain of responsibility, may well be the only real commonality between them. This is clear from a glance at the PTCs’ competences.161

First, the ICC Statute endows PTCs with responsibilities in the context of investigation: the issuance of orders and warrants as may be requested for that purpose by the

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160 See further Chapter 3, section 5, and Chapter 8.
prosecutor and the person concerned, the issuance of warrants of arrest or summons to appear, the protection of the national security information, the preservation of evidence, and competences relating to a ‘unique investigative opportunity’. The PTC powers in respect of investigation are more of a ‘supervisory’ character and are more akin to the role of the judge of freedoms rather than that of a continental examining magistrate. Secondly, PTCs provide for the protection and privacy of victims and witnesses and of the person under investigation; it is charged with conducting a regular review of the legality of that person’s continued detention where the person is subject to a warrant of arrest. Thirdly and most importantly, PTCs are responsible for making a decision on whether to confirm charges against the person and commit him for trial. Essentially, this amounts to a distinct form of substantive judicial supervision over the charging activity of the prosecutor. The meaning and implications of this procedure for the conduct of trial process deserve a detailed consideration.

### 3.3.2 Confirmation of charges

While the full exposition of the functions and powers of PTC ICC need not be undertaken, the rationale behind the confirmation of charges procedure and its implications for the role of trial before the ICC are the questions most relevant here. This is because more than any other element of the ICC procedure, it may give rise to a claim that it draws some weight away from trial adjudication. This procedure has been described as a ‘distinctive mark’ of the ICC process and a ‘linking interface’ between the investigation and the trial phase. Having no direct equivalents in the domestic jurisdictions, ICC confirmation could be compared with committal to trial at common law and the order to close the case file in civil law. Arguably, its closest analogue in the ad hoc tribunals is the review of indictment (Rule 47). Its rationale of preventing ‘frivolous or wilful’ prosecutions is mirrored by the main objective of

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162 Art. 57(3)(a) and (b) ICC Statute.
163 Art. 58 ICC Statute.
164 Arts 56 and 57(3)(c) ICC Statute.
165 Art. 57(3)(c) ICC Statute.
166 Art. 60 ICC Statute.
167 Art. 61 ICC Statute and Rule 121 ICC RPE.
168 K. Shibahara/W.A. Schabas, ‘Article 61’, in O. Triffterer (ed.), The Commentary to the Rome Statute (on confirmation hearing as ‘an important example of the increased judicial control … over the Prosecutor that sets the ICC apart from other international criminal justice institutions.’).
171 To the same effect, see Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, Prosecutor v. Mbarushimana, ICC-01/04-01/10-514, AC, ICC, 30 May 2012 (‘Mbarushimana appeal decision’), para. 43. Cf. Shibahara/Schabas, ‘Article 61’ (n 168), at 1172-3 (comparing confirmation of charges with the ad hoc tribunals’ Rule 61 procedure, and not Rule 47 procedure, as its ‘closest equivalent’). While both ICC confirmation of charges and the Rule 61 procedure are conducted in open court, there are material differences. Although the confirmation may be held in the absence of the accused, namely when the person waived the right to be present or when the person ‘fled or cannot be found’ (Art. 61(2) ICC Statute) it is not a regular course of events, as the person should normally be present.
172 Decision on the Review of the Indictment, Prosecutor v. Kapreškić et al., Case No. IT-95-16-I, Judge McDonald, ICTY, 10 November 1995 (‘Kapreškić et al. confirmation decision’), at 3; Decision on the Review of the Indictment, Prosecutor v. Kordić et al., Case No. IT-95-14-I, Judge McDonald, ICTY, 10 November 1995 (‘Kordić et al. confirmation decision’), at 3; Decision on Review of Indictment, Prosecutor v. S. Milošević, Case No. IT-99-37-I, Judge May, ICTY, 22 November 2001 (‘Milošević III confirmation decision’), para. 2 (‘The
the ICC confirmation of charges (filtering out of unmeritorious cases). However, the important differences concern both nature and form. The ICC confirmation is not an *ex parte* prosecution-only procedure: rather it is an adversarial hearing convened in open court in the presence of the accused at which the prosecutor presents evidence to satisfy a distinct standard of proof (‘sufficient evidence to establish substantial grounds to believe that the person committed the crime’) and can be contradicted by the defence.173

By contrast, the standard for the confirmation of indictment in the *ad hoc* tribunals is set as ‘*prima facie case*’.174 ICTY and ICTR Rule 47(B) translates this test as requiring the prosecutor to be ‘satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal’.175 Given that the common law ‘*prima facie case*’ has a specific meaning, the validity of this interpretation proved contentious. Some ICTY judges and scholars held that Rule 47(B) does not accurately reflect the standard under Article 19(1), while others considered it to be correct and *intra vires*.176 In some cases, a higher standard was applied, identical to that for non-acquittal in the mid-trial after the close of prosecution case (Rule 98bis ICTY RPE).178 But subject to variations in the wording, the predominant interpretation has still been ‘a credible case, which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge’.179 It makes sense given that the ‘no case to answer’ as a more advanced stage of proceedings would invite a more onerous standard of

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173 Art. 61(5)-(7) ICC Statute.
174 Arts 18(4) and 19(1) ICTY Statute (‘Upon a determination that a *prima facie case* exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. … The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie case* has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.’). See also Arts 17(4) and 18(1) ICTR Statute.
176 Rule 61(C) ICTY and ICTR RPE.
177 *Kupreškić et al.*, confirmation decision (n 172), at 2 (Judge McDonald: ‘Although the meanings are close, I am not completely convinced that “*prima facie case*” fits exactly the standard of “reasonable grounds”.’); *Review of the Indictment, Prosecutor v. Rajić*, Case No. IT-95-12-I, Judge Sidhwa, ICTY, 29 August 1995 (‘Rajić confirmation decision’), at 2 and 8-9 (finding that Rule 47(B) is *intra vires*). But cf. D. Hunt, ‘The Meaning of a “*Prima Facie Case*” for the Purposes of Confirmation’, in R. May et al. (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrieille Kirk McDonald* (The Hague: Kluwer, 2001) 137 and 146 (arguing that Rule 47(B) is *ultra vires* the Statute as it lowers the *prima facie* test).
178 *Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, Prosecutor v. Milošević*, Case No. IT-99-37-I, Judge Hunt, ICTY, 29 June 2001, para. 3 (‘whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge’).
179 *Kupreškić et al.*, confirmation decision (n 172), at 2-3 (importing this standard from the commentary to Art. 27(1) of the 1994 ILC Draft Statute for an ICC); *Kordić et al.* confirmation decision (n 172), at 3; *Decision on Review of Indictment and Application for Consequential Orders, Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, Judge Hunt, ICTY, 24 May 1999, para. 4; *Decision on Review of Indictment and Application for Consequential Orders, Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, Judge Hunt, ICTY, 24 May 1999, para. 4 (‘where the material facts pleaded in the indictment constitute a credible case’); *Milošević III confirmation decision* (n 172), para. 14 (‘a *prima facie case* is a credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused’); *Order Granting Leave to file an Amended Indictment and Confirming the Amended Indictment, Prosecutor v. Mladić*, Case No. IT-95-5/18-1, Judge Orie, 8 November 2002, para. 26; *Decision on Review of Indictment and Order for Non-Disclosure, Prosecutor v. Ćermak and Markač*, Case No. IT-03-73-I, Judge Parker, ICTY, at 2; *Decision on Review of the Indictment, Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-I, Judge Robinson, ICTY, 9 March 2005, at 2.
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‘evidence capable of supporting a conviction’ (i.e. ‘evidence on which a reasonable Trial Chamber could convict’). The requisite quantum of evidence at the indictment review stage merely establishes nominal sufficiency of the basis to convict. Be it as it may, the threshold for confirmation of charges at the ICC is higher—or at least certainly not lower—than at the analogous ICTY standard, and it must be satisfied by the prosecutor in respect of each charge. In construing ‘substantial grounds for believing’ with reference to the ECtHR jurisprudence as ‘strong grounds’, the Lubanga Pre-Trial Chamber clarified that the Prosecutor ‘must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations’, so as to ‘enable all the evidence admitted for the purpose of the confirmation hearing be assessed as a whole’. This interpretation has consistently been followed in the ICC jurisprudence. The ICC PTCs have explained that the Statute establishes ‘progressively higher evidentiary thresholds in articles 15, 58(1), 61(7) and 66(3)’, meaning that the confirmation threshold is more exacting than ‘reasonable grounds to

180 On Rule 98bis, see Chapter 10. See also Judgement, Prosecutor v. Jelisić, Case No. IT-95-10-A, AC, ICTY, 5 July 2001, paras 36-7.
181 Rakić confirmation decision (n 177), at 8 (‘Reasonable grounds ... point to such facts and circumstances as would justify a reasonable or ordinarily prudent man to believe that a suspect has committed a crime. To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime. ... The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime. The expression “sufficient evidence” is thus not synonymous with “conclusive evidence” or “evidence beyond reasonable doubt.”’)
182 Mbarushimana appeal decision (n 171), para. 43 (‘Such a process clearly requires the Pre-Trial Chamber to go beyond looking at the Prosecutor’s allegations “on their face” as is done in confirming an indictment at the ICTY or ICTR’). De Beco, ‘The Confirmation of Charges before the ICC’ (n 170), at 475 (‘While the confirmation of an indictment before the ICTY and the ICTR is the starting point of the pre-trial phase, the confirmation of charges before the ICC is actually end of the end. The standard to be reached in the latter case should therefore be higher than in the former.’). Somewhat differently, see Miraglia, ‘Admissibility of Evidence’ (n 169), at 498 (arguing that the “prima facie case” standard is not higher than ‘substantial grounds for believing’ and that “[the two procedures are so disparate from each other that a comparison between the two standards is impossible, and at any rate would be unhelpful.”).
183 Decision on the Confirmation of Charges, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-803-tEN, PTC I, ICC, 29 January 2007 (‘Lubanga confirmation decision’), para. 38 (referring to Soering v. UK and a partially dissenting opinion by three judges in Mamatkulov and Ashkarov v. Turkey). For a critical note, see de Beco, ‘The Confirmation of Charges before the ICC’ (n 170), at 475 and n20 (referring to the different legal context in which the ECtHR discussed the standards such as ‘serious reasons to believe’ and ‘strong grounds for believing’, namely Article 3 and ‘death row phenomenon’).
184 Lubanga confirmation decision (n 183), para. 39.
185 E.g. Decision on the Confirmation of Charges, Prosecutor v. Katanga and Ngudjolo, Situation in the DRC, ICC-01/04-01/07-717, PTC I, ICC, 30 September 2008 (‘Katanga and Ngudjolo Chui confirmation decision’), paras. 65-6 and Partly Dissenting Opinion of Judge Anita Ušacka, ibid., para 2 (‘the differences between the Pre-Trial and the Trial phases do not relieve the Prosecution of its duty in the Pre-Trial phase to provide sufficiently solid evidence concerning both the subjective and objective elements of each of the crimes charged and the mode of liability’); Decision on the Confirmation of Charges, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-424, PTC III, ICC, 15 June 2009 (‘Bemba confirmation decision’), para. 29; Decision on the Confirmation of Charges, Prosecutor v. Mbarushimana, Situation in the DRC, ICC-01/04-01/10-465-Red, PTC I, ICC, 16 December 2011, para. 40; Decision on the Confirmation of Charges, Prosecutor v. Abu Garda, Situation in Darfur, ICC-02/05-02/09-243-Red, PTC I, ICC, 8 February 2010, paras 35-9; Corrigendum of the “Decision on the Confirmation of Charges”, Prosecutor v. Nourain and Jerbo, Situation in Darfur, ICC-02/05-03/09-121-Corr-Red, PTC I, ICC, 7 March 2011, paras 29-31; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Prosecutor v. Ruto et al., Situation in Kenya, ICC-01/09-01/11-373, PTC II, ICC, 23 January 2012 (‘Ruto et al. confirmation decision’), para. 40; Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute, Prosecutor v. Muthaura et al., Situation in Kenya, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, para. 52; Decision adjoining the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, Prosecutor v. Gbagbo, Situation in the Côte d’Ivoire, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013 (‘Gbagbo confirmation adjournment decision’), para. 17.
believe’ required for the issuance of an arrest warrant by the PTC (Article 58(1)(a)) and less demanding than the standard for convicting, ‘beyond reasonable doubt’ (Article 66(3)).

The higher threshold for confirming the charges entails a higher degree of complexity of the ICC confirmation procedure. As noted, at the ad hoc tribunals the review is an ex parte written procedure conducted by a single judge prior to the arrest and transfer of accused. The ICC confirmation takes place upon arrest or voluntary appearance in open court before PTC constituted of three judges who are to decide by the majority. Secondly, ICC confirmation is a public and oral procedure at which summary evidence may be submitted by the Prosecutor and rebutted by the person who has the right to object to the charges, challenge the prosecution evidence, and present own evidence. This quality makes the ICC confirmation a truly adversarial hearing that should be conducted with the respect for equality of arms. But this also brings with it the need for the suspect to obtain the disclosure of evidence—both the evidence the OTP intends to rely upon for the purpose of confirmation and the potentially exculpatory pieces—and hence, the need for the Court to redact the evidence to ensure the protection and privacy of witnesses, which is a cumbersome process. Finally, the participation of victims through legal representatives further adds to the complexity and dimension of the confirmation process.

3.3.3 Mini-trial before trial?

The complex nature of the ICC confirmation procedure, in particular, the presentation of evidence and its evaluation by the Pre-Trial Chamber, may raise concerns as regards its relation to the trial, if it is eventually to be held. More specifically, there is a risk that the confirmation will in reality turn into a sort of ‘mini-trial’ before trial. If this concern is valid, the confirmation process might affect the role of the trial process by drawing onto itself some of the core activities associated with the trial, including the proof-taking and the

186 E.g. Bemba confirmation decision (n 185), para. 27; Ruto et al. confirmation decision (n 185), para. 40 (‘higher than the one required for the issuance of a warrant of arrest or summons to appear, but lower than that required for a final determination as to the guilt or innocence of an accused.’); Gbagbo confirmation adjournment decision (n 185), para. 18. See also Miraglia, ‘Admissibility of Evidence’ (n 169), at 495 and 498; Shibahara/Schabas, ‘Article 61’ (n 168), at 1178; Ambos and Miller, ‘Structure and Function of the Confirmation Procedure’ (n 169), at 345-6; Nerlich, ‘The Confirmation of Charges Procedure (n 170), at 1343.
187 Miraglia, ‘Admissibility of Evidence’ (n 169), at 490 (‘much more complex than its equivalent in other international criminal tribunals’).
188 Art. 19(2) ICTY Statute and Art. 18(2) ICTR Statute (‘Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of trial.’).
189 Art. 57(2)(a) ICC Statute.
190 Art. 61(6) ICC Statute.
191 Miraglia, ‘Admissibility of Evidence’ (n 169), at 495; Ambos and Miller, ‘Structure and Function of the Confirmation Procedure before the ICC’ (n 169), at 340; Nerlich, ‘The Confirmation of Charges Procedure (n 170), at 1342.
192 Art. 61(2) and (3)(c) ICC Statute; Decision on the Final System of Disclosure and the Establishment of a Time Table, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-102, PTC I, ICC, 15 May 2006. See also Nerlich, ‘The Confirmation of Charges Procedure (n 170), at 1352-3 (the administration of redactions has been ‘[p]articularly resource-intensive’).
193 Art. 68(3) ICC Statute; Rule 89(1) ICC RPE. E.g. Decision on the Arrangements for Participation of Victims a/0001/06; a/0002/06 and a/0003/06 at the Confirmation Hearing, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-462, PTC I, ICC 22 September 2006; Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, Prosecutor v. Ruto et al., ICC-01/09-01/11-249, PTC II, ICC, 5 August 2011.
194 R. Cryer et al., An Introduction to International Criminal Law and Procedure 2nd ed. (Cambridge: Cambridge University Press, 2010) 460; Nerlich, ‘The Confirmation of Charges Procedure (n 170), at 1347 (‘the objective of ensuring that only properly substantiated cases proceed to trial is at tension with the need to avoid a duplication of the trial.’).
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ascertainment of facts. But according to some commentators, ‘a teleological reading of the Statute indicates that the trial, and not the confirmation hearing, will be the centerpiece of the Court’s proceedings in terms of acquiring evidence upon which to determine a person’s criminal responsibility’. As is shown below, such reading is confirmed by the actual practice.

The disclosure, presentation, and assessment of evidence for the purpose of confirmation hearing fall short of the depth and comprehensiveness appropriate for the trial. Because the PTC need not be convinced beyond reasonable doubt, the prosecution is not supposed to call witnesses expected to testify at trial and instead may rely exclusively on documentary or summary evidence, although it should be sufficiently reliable to warrant confirmation. The confirmation procedure has a different purpose than establishing the guilt or innocence as the way to determine the individual criminal responsibility – this is clearly attested by the Article 61(7) evidentiary standard, as just discussed. There may be the risk that the PTC would orient itself on a higher evidentiary bar or conduct an excessively profound factual inquiry. But it is the PTC judges’ ultimate responsibility to ensure the balanced application of the Statute’s provisions.

The confirmation regime should not overstep the normative limits intrinsic in the PTC’s mandate as a ‘gatekeeper’ tasked with filtering out cases that do not warrant a trial. The judges should respect the notion that the confirmation of charges is not there to ‘expropriate’ the functions of the trial so as to amount to the ‘trial before trial’. Otherwise, the decision to confirm the charges would weigh heavily against the accused and create a strong presumption of guilt. As a result of that, the person subject to a confirmation decision would suffer a prejudice for the purpose of a forthcoming trial. Just as the confirmation of charges should not merely rubber-stamp the charges by looking at the prosecution evidence on its ‘face value’, the ICC trials should not be turned into a formality. Therefore, it is essential that the purposes and legal tests at the confirmation hearing and at trial are kept strictly apart, in full accordance with the Statute.

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196 Art. 61(5) ICC Statute. See e.g. Decision concerning the Prosecution Proposed Summary Evidence, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-517, PTC I, ICC, 4 October 2006; Mbarushimana appeal decision (n 171), para. 47 (‘The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial.’); Gbagbo confirmation adjournment decision (n 185), paras 24-35. See also Ambos and Miller, ‘Structure and Function of the Confirmation Procedure before the ICC’ (n 169), at 346 (‘The examination of the evidence is more than a mere formality but less comprehensive than in the actual trial, i.e., it is not a trial in advance.’); Nerlich, ‘The Confirmation of Charges Procedure (n 170), at 1352 (‘by far not all evidence that will feature at trial will have been disclosed before the case reaches the Trial Chamber’).
197 Miraglia, ‘Admissibility of Evidence’ (n 169), at 497 (‘if the elements admitted at the confirmation hearing and at trial were the same, the PTC’s decision could influence the Trial Chamber thereby diminishing its “virginity”.’).
198 Ambos and Miller, ‘Structure and Function of the Confirmation Procedure before the ICC’ (n 169), at 348 (the confirmed charges may be (mis)interpreted as a strong presumption of guilt, especially where the defence has already adduced the available exculpatory evidence during the confirmation hearing); de Beco, ‘The Confirmation of Charges at the ICC’ (n 170), at 475 (if the prosecutor had to prove that the person has committed the crimes this ‘would lead to the confirmation of charges having the effect of prejudging the outcome of the trial’).
199 Miraglia, ‘Admissibility of Evidence’ (n 169), at 496 (‘This difference is essential to preserve the confirmation hearing’s purpose and not to anticipate the trial.’).
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The issue of the PTC’s role in respect of truth-finding has led to some seemingly inconsistent interpretations in the ICC’s early jurisprudence. The PTC judges held different views on whether the PTC may order the submission of additional evidence for that end under Article 69(3). In *Katanga and Ngudjolo*, a single judge of PTC ruled that it may not because Article 69(3) limits such judicial orders to situations where additional evidence is required for ‘the determination of the truth’, whereas the PTC is not a ‘truth-finder’ but determines whether the Article 61(7) threshold is met by the prosecution evidence. But the *Bemba* PTC held differently with reference the Statute and Rules. First, Article 69(3) refers to the Court as a whole and not just to the Trial Chamber; secondly, Rule 63(1) provides that the rules of evidence, together with Article 69, ‘shall apply in proceedings before all Chambers’. Thirdly, it noted that according to Rule 122(9), Article 69 shall apply *mutatis mutandis* at the confirmation hearing, subject to Article 61.

Accordingly, the *Bemba* PTC interpreted these provisions as granting the PTC the power to request the submission of further evidence. But this competence is qualified by ‘the specific purpose and limited scope of the confirmation of charges’, namely that ‘in contrast to the trial phase, the Chamber does not have to determine the guilt of the person prosecuted beyond a reasonable doubt.’ The PTC considered the ascertainment of the truth to be ‘the principal goal of the Court as a whole’ and that the Chamber serves it by stopping cases which do not meet the Article 61(7) standard from going to trial. It emphasized the importance of its own contribution to truth-finding as follows:

its role is particularly important since, under articles 61(7) and 61(9) of the Statute, it defines the parameters of the trial and therefore the extent of the Trial Chamber’s authority. By setting the parameters of the trial, it simultaneously determines the extent of the Trial Chamber’s authority to determine the truth which is the ultimate goal of any procedure before this Court.

Essentially, there is no disagreement between the statements in *Katanga and Ngudjolo* and in *Bemba*, since they espouse different interpretations of ‘truth-finding’ – in a narrow sense relating to the truth of the charges (guilt or innocence) and in a broad sense as an overarching objective of the ICC proceedings. Clearly, both pronouncements reserve the task of determining the issue of the guilt or innocence exclusively to the Trial Chamber. Although the ICC’s confirmation practice to date has not been flawless, PTCs have been keenly aware of the limited scope of the confirmation and of their role as mere ‘gatekeepers’. They have conceived of the purpose of the procedure as being a way to filter out unmeritorious cases, in line with much of the academic commentary. The PTC have routinely stated that the purpose is to identify cases which should not be allowed to go to

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204 *Ibid.*, para. 11.
206 See War Crimes Research Office, ‘The Confirmation of Charges Process at the International Criminal Court’, Report, International Criminal Court Legal Analysis and Education Project, October 2008 (‘WCRO Confirmation Report’) (discussing problems such as delays in disclosure due to the difficulties in adopting protective measures for victims and witnesses and *propiro motu* addition of a charge or requalification of facts by PTC).
207 Shibahara/Schabas, ‘Article 61’ (n 168), at 1172; Ambos and Miller, ‘Structure and Function of the Confirmation Procedure before the ICC’ (n 169), at 347-8 (‘[confirmation] operates as a filter and thus ensures that only the really important cases go to trial’); M. Marchesiello, ‘Proceedings before the Pre-Trial Chambers’, in Cassese/Gaeta/Jones (eds), *The Rome Statute Commentary* 1238; Nerlich, ‘The Confirmation of Charges Procedure’ (n 170), at 1347-8.
trial, and to shield the person from unfounded accusations. In strong terms, the jurisprudence has dispelled the concern that the confirmation procedure would purport to take over the prerogatives of the Trial Chamber and amount to a ‘mini-trial’ or a ‘trial before the trial’. In Abu Garda, PTC I stated that ‘at no point should Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction.

In this light, the judges have sought to strike the right balance between the confirmation of charges and the (possible) trial by giving a restrictive interpretation to the auxiliary goal of the confirmation procedure – facilitating the preparation for trial in the event that charges are confirmed. The single judge in Katanga and Ngudjolo held that this requires the prosecution to ‘limit the number of witnesses on whom it intends to rely at the confirmation hearing to the very “core witnesses” of the case’ and to confine the debate of evidence to ‘analysing the core evidence supporting the charges’. As for the effects of the defence on the prosecution case, the confirmation hearing would have come closer to an actual trial if the defence evidence or challenges to the prosecution evidence had a strong impact on the determination of whether or not the prosecutor had met the ‘sufficient evidence’ standard. But on the other hand, the PTC should take the defence’s objections and challenges to the prosecution evidence seriously, if the confirmation is an adversarial inter partes hearing in a true sense.

208 Lubanga confirmation decision (n 183), para. 37 (‘the purpose of the confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought’); Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, Prosecutor v. Katanga and Ngudjolo, Situation in the DRC, ICC-01/04-01/07-428-Corr, PTC I, ICC, 25 April 2008 (‘Katanga and Ngudjolo decision on evidentiary scope of confirmation’), paras 5-6 (‘The confirmation hearing … aims at ensuring that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime… [It] has a limited scope and by no means can it be seen as an end in itself, but … as a means to distinguish those cases that should go to trial from those that do not go to trial.’); Katanga and Ngudjolo confirmation decision (n 185), para. 63; Bemba confirmation decision (n 185), para. 28; Abu Garda confirmation decision (n 185), para. 39; Banda and Jerbo confirmation decision (n 185), para. 31; Mbarushimana confirmation decision (n 185), para. 41; Mathaura et al. confirmation decision (n 185), para. 52; Ruto et al. confirmation decision (n 185), para. 40. This has been endorsed by the AC: Mbarushimana appeal decision (n 171), para. 39 (‘the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not’). See also Ambos and Miller, ‘Structure and Function of the Confirmation Procedure before the ICC’, supra note 169, at 340-1 (‘the primary function of the confirmation procedure is to check and balance the Prosecutor’); G. Bitti, ‘Two Bones of Contention between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursus Delictorum’, in H. Fischer et al. (eds), International and National Prosecution of Crimes under International Law: Current Developments (Berlin: Arno Spitz, 2001) 277 (‘The confirmation hearing is the trial of the work of the Prosecutor at the pre-trial stage not the trial of the accused’). 209 Lubanga confirmation decision (n 183), para. 37 (‘This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges’); Katanga and Ngudjolo confirmation decision (n 185), para. 63; Bemba confirmation decision (n 185), para. 28; Mbarushimana appeal decision (n 171), para. 39 (‘It serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence.’); Gbagbo confirmation adjournment decision (n 185), para. 18. 210 Katanga and Ngudjolo Chui confirmation decision (note 209), para. 64; Abu Garda confirmation decision (n 185), para. 39. 211 Abu Garda confirmation decision (n 185), para. 40. 212 Katanga and Ngudjolo decision on evidentiary scope of confirmation (n 208), para. 7. On the ‘preparation for trial’ aspects of confirmation, see Nerlich, ‘The Confirmation of Charges Procedure (n 170), at 1348-54. 213 Katanga and Ngudjolo decision on evidentiary scope of confirmation (n 208), paras 78-82. 214 Shibahara/Schabas, ‘Article 61’ (n 168), at 1179 (the Statute unclear on whether the defence evidence can ‘neutralize’ prosecution evidence and prevent it from meeting the ‘sufficient evidence’ standard). 215 See also C. Safferling, International Criminal Procedure (Oxford: Oxford University Press, 2012) 325.
This boils down to the question of how much benefit of the doubt the prosecution is to be allowed in the context of confirmation. In confirming charges in Lubanga, the PTC relied mostly on the prosecution evidence, which may be explained by the fact that the defence evidence was scarce. In Katanga and Ngudjolo, the PTC stated that the determination of whether the prosecution evidence would be sufficient to confirm charges will be made after ‘careful review’ of such evidence, whereas the defence challenge which may affect its probative value did not rule out the possibility for the Chamber to rely on it for the purpose of confirmation. In Abu Garda, it stated that ‘inconsistent, ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges’.

However, such a conclusion would be based not on ‘the application of the principle of in dubio pro reo to the assessment of the probative value of the evidence presented by the Prosecution at this stage of the proceedings’, but rather on ‘a determination that evidence of such a nature is not sufficient to establish substantial grounds to believe that the suspect committed the crimes.’ But in Gbagbo PTC adjourned the confirmation of charges hearing pursuant to Article 61(7)(c) as it was critical about the reliability of (anonymous hearsay) evidence adduced by the prosecutor and requested additional evidence. In outlining its approach to evidence, the Chamber noted that the previous jurisprudence ‘has been more forgiving’ toward the prosecutor in this respect. It is debatable—and became subject to a strong dissenting opinion by Judge Fernandez de Gurmendi—whether the Chamber majority’s approach to evidence is supported by the correct interpretation of the purposes of the confirmation hearing and accorded the prosecution the due benefit of doubt. Be it as it may, the majority’s assessment proceeded from an interpretation of the evidentiary standard at this stage and did not implicate the issues of guilt or innocence of the defendant.

Unlike at trial, the prosecutor has some benefit of a doubt at the confirmation stage, which is logical given its specific purpose. The ability of the PTC to evaluate the credibility

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216 De Beco, ‘The Confirmation of Charges before the ICC’ (n 170), at 478.
217 Katanga and Ngudjolo Chui confirmation decision (note 209), para. 69. Cf. Lubanga confirmation decision (n 183), para. 39 (‘After an exacting scrutiny of all the evidence, the Chamber will determine whether it is thoroughly satisfied that the Prosecution’s allegations are sufficiently strong to commit [a person]… for trial.’).
218 Katanga and Ngudjolo confirmation decision (note 209), para. 70 (‘if the Chamber decides that a party’s challenge to a particular item of evidence or portions thereof affects its probative value, such decision does not indicate that the Chamber will not rely on such evidence or portions thereof in makings its conclusions. Rather, when ... the probative value ... is affected, for example because the evidence contains only anonymous hearsay statements or inconsistencies, the Chamber will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution. ... [A]s with any evidence presented, the Chamber will try, whenever possible, to cite additional evidence in the record which also supports the Chamber’s conclusions.’) and 125 (holding a diary by the deceased prosecution source admissible for the purpose of the confirmation but recognizing that certain challenges by the defence may affect its probative value).
219 Abu Garda confirmation decision (n 185), para. 43. See also Mbarushimana appeal decision (n 171), paras 39 and 40 (‘the Pre-Trial Chamber must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies or doubts as to credibility arising from the evidence’).
220 Abu Garda confirmation decision (n 185), para. 43.
221 Gbagho confirmation adjournment decision (n 185), paras 35 (‘the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges.’) and 44.
222 Ibid., para. 37.
223 See Dissenting opinion of Judge Silvia Fernández de Gurmendi (ICC-02/11-01/11-432-Anx-Corr, 6 June 2013), Gbagho confirmation adjournment decision (n 185), paras 6-28.
224 Miraglia, ‘Admissibility of Evidence’ (n 169), at 496 n25 (‘the PTC is obliged to consider evidence presented by the defence and take it into account for issuing the final decision: it is clear that if the weight of Defence evidence is only able to cast mere doubts on the prosecutor evidence the PTC should base its decision on the
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of witnesses will be limited and its findings presumptive rather than definitive.\(^{225}\) In principle, the weighing of each item of evidence in terms of \textit{in dubio pro reo} can only be done after the full trial in light of all evidence presented in the case.\(^{226}\) But the PTC should still conduct its evaluation of the prosecution evidence, in light of contradictions, ambiguities, and doubts as may be raised by the defence, in verifying the sufficiency of evidence for proceeding to trial.\(^{227}\) Other than for that purpose, the PTC should not pronounce on the probative value lest it would encroach on the prerogative of the Trial Chamber to weigh the evidence definitively and infringe the presumption of innocence. Definitive assessment is to be left to the Trial Chamber.\(^{228}\) Otherwise, the person committed to trial would find himself in a position of having to rebut not only the prosecution case but also the PTC’s assessment of probative value. The non-striking out of evidence as inadmissible for the purpose of a confirmation hearing with respect to which there may be doubts as to its probative value therefore accords with the standard of proof of sufficiency of evidence for establishing substantial grounds to believe, as opposed to ‘beyond reasonable doubt’\(^{229}\). That said, the benefit of doubt enjoyed by the prosecution is not without limit: the prosecution evidence should meet the threshold of sufficiency to enable the case to proceed to trial.

It is debatable whether the PTCs have in all cases honoured, as a matter of fact rather than nominally, the principled distinction between the purposes of the confirmation procedure and the trial process. Observers have argued that PTCs tend to surpass the appropriate level of depth in the examination of evidence and the apposite degree of detail of legal and dogmatic analysis.\(^{229}\) This criticism has also arisen from inside the Court. In \textit{Abu Garda}, the level of detail in examining issues became a matter of dissent by a member of the bench.\(^{230}\) In \textit{Gbagbo}, as noted, one PTC judge vigorously dissented on the ground that, in her view, the majority decision was ‘based on an expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute’\(^{231}\). According to her, the majority’s evidentiary approach created ‘an implicit incentive for the Prosecutor to submit as much evidence as possible, including live witnesses, in order to secure confirmation, this in turn compelling the Defence to do the same’

criterion of ‘\textit{in dubio pro actione}’ while the trial judge, in the same situation, should use the parameter ‘\textit{in dubio pro reo}’\(^{225}\).

\(^{225}\) \textit{Mbarushimana} appeal decision (n 171), paras 48.

\(^{226}\) See e.g. Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, \textit{Prosecutor v. Tadić}, Case No. IT-94-1-A-R77, ICTY, 31 January 2000, para. 92 (‘a tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.’ Footnotes omitted). See also Hunt, ‘The Meaning of a “Prima Facie” Case’ (n 174), at 146 (‘it is a fundamental rule in relation to determining issues of fact that no conclusion should ever be reached in relation to the credit of a witness until all the evidence has been given’).

\(^{227}\) In this sense, see \textit{Mbarushimana} appeal decision (n 171), para. 46 (‘In determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged.’).

\(^{228}\) \textit{Ibid.}, para. 47 (‘the Pre-Trial Chamber’s ability to evaluate the evidence is unlimited or that its function in evaluating the evidence is identical to that of the Trial Chamber.’).

\(^{229}\) E.g. De Beco, ‘The Confirmation of Charges before the ICC’ (n 170), at 476 and 481 (claiming this, without much explanation, regarding the \textit{Lubanga} confirmation decision, which ‘contributed to the feeling that [Lubanga] is already guilty’); Safferling, \textit{International Criminal Procedure} (n 215), at 343.

\(^{230}\) Separate Opinion of Judge Cuno Tarfusser, \textit{Abu Garda} confirmation decision (n 185), para. 7.

\(^{231}\) Dissenting opinion of Judge Silvia Fernández de Gurmendi (n 223), para. 3.
and might ‘may end up reintroducing through the back door the “mini-trial” or “trial before the trial” that the drafters and other Chambers of this Court wished so much to avoid.’

A related concern, based on the early confirmation practice, has been the length of the decisions pursuant to Article 61(7). It may seem paradoxical that the PTC have been criticized for providing a reasoned opinion in their confirmation decisions, although those are no trial judgments to which Article 74(5) would apply. By comparison, in domestic settings, decisions to arraign and commit to trial often are exempt from the ‘reasoned opinion’ requirement specifically as a way to preserve the impartiality of the trial bench. The problem is that the overly elaborate discussion of facts and evidence might prejudice impartiality of the Trial Chamber judges, and PTCs’ clarifications of legal concepts are not always necessary in light of the specific objectives of the confirmation hearing.

Indeed, all of the decisions to confirm or decline to confirm charges to date are well above hundred pages long. This does raise the question of legal drafting technique and judicial economy. But a reasoned opinion per se does not reveal a pre-judgement about the probative value of evidence and the guilt or innocence, as long as the PTC makes clear that the facts are not established but continue being mere allegations to be verified at trial. Regardless of whether it is a formal requirement towards Article 61(7) decisions, reasoning remains essential since it promotes the accused’s right ‘[t]o be informed … in detail of the nature, cause and content of the charge’ (Article 67(1)(a)) and allows parties to file interlocutory appeals on issues arising from confirmation decisions under Article 82(1)(d).

Arguably, providing a justification why the prosecution has (not) satisfied the legal test of Article 61(7) is a duty of the PTC judges and does not—or at least cannot be presumed to—compromise the impartiality of a professional trial bench.

Leaving aside the issue of the possible impact of the PTCs’ analyses of evidence on the Trial Chamber deliberations in specific cases, it is clear, from a normative perspective, that decisions confirming charges must neither foreshadow, nor create an impression of foreshadowing, the ascertainment of the truth underlying the possible verdict on the guilt or innocence. In the ICC model, the confirmation procedure may not detract or unduly influence the trial adjudication on the merits of the case. Any overreaching factual or legal analyses by the PTC will not automatically slant determinations and authority of the Trial Chamber, which is an autonomous and independent judicial organ. But in the end, this is the matter of

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232 Ibid., paras 27-8.
233 E.g. Miraglia, ‘Admissibility of Evidence’ (n 169), at 499-501; Safferling, International Criminal Procedure (n 215), at 337.
234 Ibid., at 499-500 (in Italy, decisions of preliminary investigation judge (giudice per le indagini preliminari) in conclusion of udienza preliminare are not accompanied by reasons in order ‘to avoid undue influence’ on trial judges).
235 Lubanga confirmation decision (n 183) (157 pp.); Katanga and Ngudjolo confirmation decision (n 185) (213 pp. majority decision). Cf. Gbagbo confirmation adjournment decision (n 185) (25 pp.)
236 Safferling, International Criminal Procedure (n 215), at 343.
237 See e.g. Mbarushimana appeal decision (n 171). Decisions on the confirmation of charges are not appealable as of right. Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-915, PTC I, ICC, 24 May 2007, para. 19 (‘the drafters of the Statute intentionally excluded decision confirming charges against a suspect from the categories of decisions which may be appealed directly to the Appeals Chamber.’); Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision on the Confirmation of Charges”, Prosecutor v. Abu Garda, Situation in Darfur, ICC-02/05-02/09-257, PTC I, ICC, 25 April 2010, at 5; Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la confirmation des charges” of 29 January 2007, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-926, AC, ICC, 13 June 2007, para. 15 (dismissing the Defence’s appeal against the confirmation decision made pursuant to Article 82 (1) (b) of the Statute, given that [t]he decision confirming the charges neither grants nor denies release’). See also H. Brady and M. Jennings, ‘Appeal and Revision’, in R.S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results (The Hague: Kluwer Law International, 1999) 300.
carefully balancing the functions and powers of the PTCs with those of the TCs as much as of the issue of judicial economy in the ICC system. The recent Gbagbo confirmation process demonstrates that the jurisprudence remains unsettled. The continuing complexity of the confirmation, underlain by the exigent evidentiary approach adopted by some PTCs, presents a challenge to the idea of confirmation being no ‘mini-trial’. To what extent this notion is sustainable remains to be seen from the future practice and one may the judicial disagreement in Gbagbo to be settled on appeal.

### 3.3.4 Continuity of evidence

One last related aspect of the relationship between the PTCs and the Trial Chambers that is considered because it speaks to the actual role of the trial phase in the ICC proceedings is the status at trial of evidence examined by the PTC and the channels of evidentiary communication between the Chambers. For example, if the evidence heard for the purposes of confirmation is admitted or introduced at trial automatically, the PTC would be in a position to shape the evidentiary basis of the trial judgment. In that case, the pre-trial process would overshadow in importance or at least seriously contest the role of trial as the venue for proof-taking and decision-making on the issue of guilt or innocence.

In the ICC practice, on the contrary, both the PTCs and the Trial Chambers have concurred in that admissibility determinations by the former have no binding effect on the latter. Thus, a ruling on the admissibility of a particular item of evidence for the purpose of the confirmation hearing and the decision confirming the charges as such, are without prejudice to the later ‘final determination’ as to the admissibility and probative value of evidence by the Trial Chamber. The ICC legal framework vests in the Trial Chamber the power to rule on the admissibility or relevance of evidence and to ‘assess freely all evidence’. It also establishes that its decision shall be based only on the evidence submitted and discussed before it at the trial. On that basis, the Lubanga TC concluded that determinations made by PTCs at confirmation are not binding for the purposes of trial.

Moreover, the Trial Chamber in Lubanga endorsed the principle that, subject to the possibility of submitting prior recorded testimony instead of viva voce evidence as foreseen in Rule 68(A).

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238 See also Dissenting opinion of Judge Silvia Fernández de Gurmendi (n 223), para. 26 (‘Pre-Trial Chambers need to exercise this gatekeeping function with utmost prudence, taking into account the limited purpose of the confirmation hearing. An expansive interpretation of their role is not only unsupported by law. It affects the entire architecture of the procedural system of the Court and may, as a consequence, encroach upon the functions of trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure.’).

239 Lubanga confirmation decision (n 183), para. 90 (‘[given] the limited scope of this hearing, … the admission of evidence at this stage is without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as to the admissibility and probative value’); Katanga and Ngudjolo confirmation decision (n 209), para. 71 (‘should the charges against the suspects be confirmed, any ruling on the admissibility of a particular item of evidence for the purposes of the confirmation hearing and the present decision will not preclude a subsequent determination of the admissibility of that same evidence later in the proceedings’).

240 Art. 64(9)(a) ICC Statute; Rule 63(2) ICC RPE.

241 Art. 74(2) ICC Statute (‘The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.’).

242 Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1084, TC I, ICC, 13 December 2007 (‘Lubanga trial decision on the status of pre-trial evidence and decisions’), para. 5.

243 Rule 68(A) ICC RPE: ‘When the Pre-Trial Chamber has not taken measures under Article 56, the Trial Chamber may … allow the introduction of previously recorded audio and video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave the
evidence before the Pre-Trial Chamber cannot be introduced automatically into the trial process simply by virtue of having been included in the List of Evidence admitted by the Pre-Trial Chamber, but instead it must be introduced, if necessary, de novo. Therefore, the record of the pre-trial proceedings (and all the evidence admitted for that purpose) transmitted to the Trial Chamber by virtue of Rule 130 is available mainly to be used as a “tool” to help with preparation and the progress of the case.\textsuperscript{244}

While the decision to confirm charges itself and the facts and circumstances described in the charges are binding on the Trial Chamber, the PTC’s determinations of evidentiary and procedural issues are not.\textsuperscript{245} The Trial Chamber remains responsible for constructing its evidentiary basis for the future final judgment. Even where the same evidence has already been admitted in the confirmation stage, the Trial Chamber will rely on its proper determinations concerning the admissibility and relevance and shall examine the evidence anew at trial if it is to be relied upon in the judgment for establishing the responsibility.

The trial judgments delivered thus far do not indicate deference by the Trial Chambers to the findings of the PTCs. As opposed to referring to the evidence heard and findings entered by the PTC, the Trial Chamber would normally refer to the transcripts of testimony and the parties’ submissions before it which means that the decision is based on the Trial Chamber’s own assessment of the evidence that forms integral part of the trial record.\textsuperscript{246} While the continuity of legal determinations is a distinct issue altogether, the principle still is that trial judges have full autonomy in establishing the status of the law. As a matter of jurisprudential consistency and quality of reasoning, the trial bench will have regard to the PTC’s legal conclusions. But it will necessarily re-examine any qualifications, within the binding framework of ‘facts and circumstances described in the charges and any amendments to the charges’ (Article 74(2)). As a result, they may adhere to the PTC interpretations of the law or come to a different conclusion.\textsuperscript{247} Yet again, in issues of both law and fact, the ICC confirmation hearing is not intended to discharge the functions that are proper and exclusive to the trial process. Therefore, provided that the practice is in accordance with the statutory framework, the confirmation process does not menace the normative role of the trial in the ICC procedural system.

3.4 SPSC

The SPSC in East Timor presented some unique features as regards the nature and structure of pre-trial process. While the managerial judging elements will be discussed in a due course,\textsuperscript{248} its utilization of the institute of investigating judge warrants a comment. The mandate of

\textsuperscript{244} \textit{Lubanga} trial decision on the status of pre-trial evidence and decisions (n 242), para. 8.

\textsuperscript{245} \textit{Ibid.}, para. 43 (‘The Pre-Trial Chamber and the Trial Chamber have separate functions at different stages of the proceedings, and there is no hierarchy of status between them. … [M]ost particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges.’).

\textsuperscript{246} See e.g. Judgment pursuant to Article 74, \textit{Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, paras 632-71} (with footnotes referring solely to trial transcripts and the parties’ submissions).

\textsuperscript{247} The \textit{Lubanga} TC endorsed some of the PTC legal findings: see \textit{ibid.}, paras 536, 541, 618.

\textsuperscript{248} Chapter 8.
investigating judge was envisaged in Section 12 of the UNTAET Regulation 2000/11. This judge’s function, as set forth in Section 9.1 of the TRCP, was ‘to ensure that the rights of every person subject to a criminal investigation and the rights of any alleged victims of the suspected crime under investigation are respected’.

The principal duties of the investigating judge included the issuance of warrants for coercive measures or orders requested by the public prosecutor, insofar as these are of a nature to infringe individual rights; and the regular review the lawfulness of the arrest and detention of the suspect. The label of investigating judge is a misnomer because that official did in fact not conduct the investigation but was to safeguard the individual rights in the course of investigation conducted by the prosecution. Nor was the investigating judge—or other judicial authority—charged with the duty to confirm the indictment. The indictment was to be presented to the district court by the prosecutor upon completion of the investigation. This marked the termination of the powers of the investigating judge, except for cases where the investigation continued thereafter. Distinct from the role as a guarantor of fairness of investigation, the judicial mandate did not feature any evidence-related activities that might impinge upon or interfere with the prerogatives of the trial bench of the district court in the determination of the guilt or innocence of the accused.

The consideration of preliminary motions to be raised prior to the commencement of the trial and other motions which could be filed at any time, was within the competence of the district panel or judge. Within the rubric of preliminary motions fell motions which: (a) alleged defects in the form of the indictment; (b) sought severance of counts joined in one indictment or separate trials in cases of co-accused; or (c) raised objections based upon refusal of a request for assignment of counsel. Despite the preliminary character of those issues, their resolution clearly fell within the temporal scope of the trial process and was the domain of responsibility of the trial bench.

On the issue of evidentiary communication between the pre-trial and the trial, the TRCP provided that the evidence was in principle to be examined in the most direct manner possible, subject to exceptions stipulated in the rules. One such exception was stipulated in a rule authorizing the admission of prior statements of a witness as substantive evidence in

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249 Section 12.1 UNTAET Regulation 2000/11 On Organization of Courts in East Timor, UNTAET/REG/2000/11, 6 March 2000 (‘In criminal matters, there shall be at least one judge assigned as investigating judge at every District Court in East Timor.’).

250 See also Section 9.5 TRCP (‘In order to safeguard the rights of a suspect … the Investigating Judge shall prohibit any actions of the investigating authorities that are in violation of the rights of the suspect.’).

251 Section 9.2 of the TRCP. Section 9.3 TRCP provided a list of coercive measures for which a warrant was required: (a) arrest of a suspect; (b) detention or continued detention of a suspect; (c) exhumation; (d) forensic examination; (e) search of locations and buildings; (f) seizure of goods or items, including seizure or opening of mail; (g) intrusive body search; (h) physical examination, including the taking and examination of blood, DNA, samples, and other bodily specimens; (i) interception of telecommunication and electronic data transfer; and (j) other warrants involving measures of a coercive character in accordance with the applicable law.

252 Section 20.1 and 20.9 TRCP (a review hearing should take place within 72 hours after arrest and every thirty days, each time followed by an order for the further detention, for the substitute restrictive measure (Section 21) or for release (Section 22)).

253 Section 9.6 TRCP (‘The Investigating Judge shall not interfere with the responsibilities of the public prosecutor in directing the criminal investigations, as defined in Section 7 of the present regulation’); Section 7.1 TRCP (‘The exclusive competence to conduct criminal investigations is vested in the Public Prosecution Service as provided in UNTAET Regulation No 2000/16. The competent Public Prosecutor is the only authority empowered to issue an indictment’).

254 Section 24.1 TRCP.

255 Section 24.3 TRCP (‘When the indictment is presented to the court, the powers of the Investigating Judge terminate, except the powers … described in Section 9.3 (c) through (j).’).

256 Section 33.3 TRCP. The statements and confessions by the accused before the investigating judge could be admitted at trial if the court found them to be made in compliance with Section 29A regarding the admission of guilt: Section 33.4 TRCP.
cases where their use to refresh the recollection of the witness did not succeed in doing so.\textsuperscript{258} Otherwise, the admission and examination of all evidence anew at trial was required, which entails the discontinuity of proof between the pre-trial and the trial stages. In view of these observations and despite the SPSC’s reliance on the investigative judges, their trial process as provided for in the TRCP did not face any normative competition from activities with respect to evidence and fact-finding undertaken prior to the commencement of the trial.

3.5 ECCC

The ECCC’s Internal Rules are loosely based on the French/Cambodian criminal procedure, seasoned with international fair trial safeguards and partly experimental and partly experiential rules meant to adjust the inquisitorial process to the unique circumstances and needs of adjudication of international crimes by a hybrid court with a formal power-sharing between the international and national components.\textsuperscript{259} The direct descent from the inquisitorial tradition, unparalleled in international criminal tribunals, makes the ECCC a curious case study on the issue of normative significance of trial in international criminal proceedings. One might expect that the elements typical for the French-based criminal procedure, such as the presence of the dossier and the evidentiary communication between the judicial investigation and the trial in terms of a trial court’s reliance on the results of the ‘instruction’, should downplay the importance of the trial phase in the ECCC context as the truth-finding locus. As Chapter 4 has shown, in the non-adversarial procedure, at least in its conservative version, the trial mostly serves as a platform for verifying and, to a limited extent, supplementing the proof contained in the dossier, rather than a true vehicle of firsthand fact-finding. This is one factors predetermining its less than champion position in the procedural system. It remains to be seen whether this is the case in the inquisitorial-based ECCC model.

In the ECCC, it is the office headed by the two Co-Investigating Judges (CIJ) that is responsible for the conduct of investigations, as opposed to parties (the Co-Prosecutors, the defence, and civil parties).\textsuperscript{260} The investigative function is separated from the prosecution function that is entrusted solely to the Office of Co-Prosecutors (OCP).\textsuperscript{261} Contrary to what the label suggests, the ECCC Pre-Trial Chamber (PTC) does not carry out any of the core activities associated with the pre-trial process, being the confirmation of indictment, reviewing of detention and release, or case-management and expediting the preparation for trial. This body acts as a review instance with regard to appeals from the CIJ decisions,\textsuperscript{262} next to being also a dispute-settlement mechanism resolving differences within the tribunal’s bi-partite organs (OCIJ and OCP).\textsuperscript{263}

The structure of the ECCC pre-trial process rests on three blocks: (i) prosecution (Part III.B of the ECCC IR); (ii) judicial investigations (Part III.C of the ECCC IR); and (iii) Pre-Trial Chamber proceedings (Part III.D of the ECCC IR). The public action in the prosecution is triggered by the Co-Prosecutors who act discretionally either on their own initiative or on the basis of a complaint.\textsuperscript{264} In order to identify suspects and potential witnesses, the OCP conducts a preliminary investigation by requesting the Judicial Police officers or ECCC Investigators to carry out investigative actions.\textsuperscript{265} On the basis of the collected material, and if the Co-Prosecutors have a reason to believe that crimes within the ECCC jurisdiction were

\textsuperscript{258} Section 36.4 TRCP.
\textsuperscript{259} See Chapter 1.
\textsuperscript{260} Art. 5(1) ECCC Agreement; Art. 23 new (indent 1) ECCC Law.
\textsuperscript{261} Art. 6 (1) ECCC Agreement; Art. 16 and 20 new (indent 1) ECCC Law; Rule 21(1)(b) ECCC IR.
\textsuperscript{262} E.g. Rules 66(3), 67(5) and 74.
\textsuperscript{263} Art. 7 ECCC Agreement; Art. 20 new (indent 5) and 23 new (indent 6) ECCC Law.
\textsuperscript{264} Rule 49 ECCC IR.
\textsuperscript{265} Rule 50 ECCC IR.
committed, they shall open a judicial investigation by sending an introductory submission to the CIJ accompanied by the case file and any other material of evidentiary value in their possession, including exculpatory evidence.\footnote{Rule 53 ECCC IR.} The CIJ shall investigate the facts set out in the introductory submission and have a power to charge suspects named therein or other persons, in which case they must seek advice of the Co-Prosecutors.\footnote{Rule 55(2) and (4) ECCC IR.}\footnote{Rule 55(3) ECCC IR.} The new facts coming to the CIJ’s knowledge will not be investigated unless the CIJ, after having referred those facts to the OCP, receive a supplementary submission.\footnote{Decision on Appeal against Closing Order indicting Kaing Guek Eav alias “Duch”, Case File No. 001/18-2007-ECCC/OCIJ (PTC 02), PTC, ECCC, 5 December 2008 (’Duch closing order appeal decision’), paras 35-7.} Thus, the Co-Prosecutors do not only trigger the judicial investigation, but also define its scope with respect to both facts and legal characterizations.\footnote{Rule 55(10) ECCC IR.} In carrying out the judicial investigation, the CIJ are guided by the requirement of ascertaining the truth impartially and are placed under a duty to gather both incriminating and exculpatory evidence. Acting proprio motu or at the request of the Co-Prosecutors, a Charged Person, or a Civil Party,\footnote{Rule 55(5)(a) and (8), 57-62 ECCC IR. Art. 23 new (indent 8) ECCC Law permits the CIJ to order the Co-Prosecutors to interrogate witnesses.}\footnote{Rule 55(5)(b) ECCC IR.}\footnote{Rule 55(5)(c) ECCC IR. Art. 23 new (indent 9) ECCC Law authorizes the CIJ to seek the assistance of Cambodia, which shall comply with the request.}\footnote{Rule 55(5)(d) ECCC IR.}\footnote{Rule 23bis(2) and 23ter ECCC IR.}\footnote{Rules 63-65 ECCC IR.}\footnote{Rule 66 ECCC IR.}\footnote{Rule 66(5) ECCC IR.} the CIJ are authorized: (i) to summon and question suspects, to interview witnesses and victims, to collect exhibits, seek expert opinions, and conduct on-site investigations;\footnote{Rule 67 ECCC IR.} (ii) to take any appropriate measures to provide for safety and support of potential witnesses and their sources;\footnote{Rule 67(3)(c) ECCC IR (the case is to be dismissed when ‘[t]here is not sufficient evidence against the Charged Person’).} (iii) to seek information and assistance from states, the UN, or other organizations or sources;\footnote{Rule 67(5) ECCC IR. See also Duch closing order appeal decision (n 269), paras 28-44 (discussing the scope of appellate review of closing orders and asserting the power of the PTC to change legal qualifications therein by adding new offences or modes of liability).} and (iv) to issue such orders as may be necessary to conduct the investigations, including summonses, order for arrest and detention.\footnote{Rules 63-65 ECCC IR.} Besides, the CIJ decide upon the applications by victims to be joined as Civil Parties and may organize common legal representation,\footnote{Rule 66 ECCC IR.} as well as order the provisional detention of a charged person and decide on release and bail.\footnote{Rule 66(5) ECCC IR.}

When the CIJ consider that an investigation has been concluded, they shall notify the parties, who may request further investigative action; the CIJ orders rejecting such requests may be appealed to the PTC within 30 days.\footnote{Rule 67(5) ECCC IR.} Subsequently, the CIJ forward the case file to the Co-Prosecutors who shall issue a final submission requesting either to indict the charged person and send him or her to trial, or to dismiss the case.\footnote{Rule 67(3)(c) ECCC IR (the case is to be dismissed when ‘[t]here is not sufficient evidence against the Charged Person’).} The investigation shall be concluded with the CIJ issuing closing orders, in which they are not bound by the OCP submissions.\footnote{Rule 67(3)(c) ECCC IR.} The evidentiary threshold for indicting the accused is that of ’sufficient evidence’.\footnote{Rule 67(5) ECCC IR.} The Co-Prosecutors, the accused, and civil parties may appeal such orders to the PTC in accordance with Rule 74.\footnote{Rule 67(5) ECCC IR. See also Duch closing order appeal decision (n 269), paras 28-44 (discussing the scope of appellate review of closing orders and asserting the power of the PTC to change legal qualifications therein by adding new offences or modes of liability).} As noted, the PTC is not involved with any pre-trial activities but has an exclusive jurisdiction over: (i) disagreements between the Co-Prosecutors
Chapter 6: Centrality of Trial

and the CIJ;\(^{282}\) (ii) appeals against decisions of the CIJ filed by the OCP, the charged or accused person and civil parties;\(^{283}\) (iii) applications to annul investigative action;\(^{284}\) and (iv) other appeals.\(^{285}\)

The pre-trial process, encompassing the activities of the OCP, OCIJ, and the PTC, discharges unique functions, among which establishing the grounds for investigative action, identifying a suspect, collecting evidence, committing the suspect to trial, and disposing of the possible interlocutory appeals in this connection. These activities do not encroach upon the prerogatives of the Trial Chamber in deciding the case on the merits. But, as indicated above, the overall significance of the trial phase and the autonomy of the trial court in adjudicating facts and reaching the judgment, depends on the role of the criminal case file and the deference to be given by the Trial Chamber to the findings reached by the OCIJ.

The OCIJ’s decision to indict the suspect and to commit him or her to trial will in the ordinary course of events be based on the results of an official investigation conducted with equal attention to incriminating and exonerating aspects of evidence to which all participants have provided input by requesting investigative actions. By definition, as compared to the output of parallel partisan investigations in the adversarial process, a case file carries a substantial weight being a nearly comprehensive evidentiary basis for the decision in the case. The presumption is that unless the investigative judges have not done the investigation properly, little if any additional relevant evidence to that already on the case file will be identified and proposed by the parties for the examination at trial. This may entail that the significance of the trial phase as the forum for the examination of evidence and the establishment of the truth in earnest may be reduced or even be secondary to the judicial fact-finding in the pre-trial stage.

However, the parameters of proof-taking and adjudication by the Trial Chamber as provided for in the ECCC IR make this less than a preordained conclusion. In fact, like in many modern inquisitorial system on the national level, the trial process at the ECCC is more than a pro forma event for the superficial verification of the investigative hypotheses formulated in the closing order and emerging from the case file. First, the ECCC proceedings are subject to the principles of fairness and adversarial hearing.\(^{286}\) This means at least that the accused should be allowed a meaningful opportunity to challenge the evidence against him contained in the dossier and presented during trial. Secondly, the OCP is the sole organ with the onus of proof at trial and the applicable standard is ‘beyond reasonable doubt’.\(^{287}\) The case file is not the sole basis for the decision because the Chamber may decide to hear additional experts and witnesses proposed by the Co-Prosecutors, the accused, and the civil parties at the preparatory stage prior to the initial hearing.\(^{288}\) This means that the Trial Chamber is vested with its independent fact-finding role and is not limited to examining the evidence collected by the OCIJ. Thirdly, Rule 87 provides that the court’s decision ‘shall be based only on evidence that has been put before the Chamber and subjected to examination’.\(^{289}\) The former limb means that the decision may be based on evidence from the case file ‘provided it has been put before the competent parties and the Chamber has had an opportunity to consider it in court’.\(^{290}\) Fourth, the Trial Chamber may order additional investigations where it considers

\(^{282}\) Rules 71 and 72 ECCC IR.
\(^{283}\) Rule 74 ECCC IR.
\(^{284}\) Rules 73(b) and 76 ECCC IR.
\(^{285}\) Rule 73(c) ECCC IR.
\(^{286}\) Rule 21(1)(a) ECCC IR.
\(^{287}\) Rule 87(1) ECCC IR (‘The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt.’).
\(^{288}\) Rule 80(3) and 80bis(2) ECCC IR. For a discussion, see Chapter 8.
\(^{289}\) Rule 87(2) ECCC IR (emphasis added).
\(^{290}\) Rule 87(3) ECCC IR.
them necessary. These provisions entail that any evidence should be examined during trial for the court to be able to rely on it in its judgment and, therefore, that the principle of immediacy is fully applicable before the ECCC. This ensures that the ECCC trials are a true venue for the factual inquiry by the judges, as opposed to formal transposition of the dossier onto the trial record. Indeed, otherwise there would be no point in the extensive re-interrogation by the judges and by all trial participants of the accused, experts, witnesses, and civil parties, who have previously been examined by the CIJ.

That said, the role of the trial process in the ECCC is not necessarily the same as in other international tribunals which do not envisage a judicial investigation function. The fact that the official inquest has occurred prior to the trial and led to the OCIJ decision to indict the charged person on the basis of ‘sufficient’ evidence, might in itself detract from the fact-finding monopoly of the trial. As a result of the trial, the factual bases for committing the person to trial—formally tentative and incomplete as they are—will more likely acquire finality than stand to be challenged and reversed by any surprising developments or the newly discovered evidence at trial. There is no room for intrigue and surprise intrinsic on a ‘trial contest’ especially where, like in Case 001, the accused acknowledges incriminating facts and assumes responsibility in the pre-trial stage during the OCIJ examination. In such cases, the trial will ordinarily serve to fill in the gaps, expand upon, and check the pre-trial record and as a venue for having that record presented in open court. It will less amount to a unique judicial examination of the facts and evidence.

The proponents of the trial as a normative phenomenon should not take this ambivalence as an alarming signal. In the ECCC context, it is rather a corollary of the ‘inquisitorial’ nature and structure of the process. The trial phase retains the core functions of the first-hand examination of evidence in accordance with the principle of immediacy and of adjudicating the individual criminal responsibility on that basis. Still, there is truth in the perception that in the ECCC system the trial concedes its exclusivity as the truth-finding locus and to a greater extent than elsewhere shares the label of the ‘prime phase’ of the proceedings with the judicial investigation stage.

3.6 STL

The inclusion of the formal function of a Pre-Trial Judge (PTJ) is an important hallmark of the pre-trial procedure before the STL. It is important to consider that, next to the strong civil-law (French) influence of the STL Lebanese legal system, the STL Rules were to a significant extent modeled upon those of the ICTY and took into account its experience. The institute of the PTJ reflects a common trend discernible in international criminal procedure towards the growing sophistication of the pre-trial process. The PTJ is a holder of a unique blend of competences attesting to the sui generis nature of his position as ‘an independent and neutral

291 Rule 93(1) ECCC IR.
292 See an extensive factual basis underlying Closing Order Indicating Kaing Guek Eav alias Duch, Case File No. 002/14-08-2006, OCIJ, ECCC, 8 August 2008 (‘Duch closing order’), paras. 20-128. The Duch closing order found that ‘as a result of the judicial investigation, there is sufficient evidence (charges suffisantes) that KAING Guek Eav alias DUCH, through his acts or omissions in Phnom Penh and within the territory of Cambodia, between 17 April 1975 and 6 January 1979, as Deputy Secretary or Secretary of S21, planned, instigated, ordered, committed, or aided and abetted, or is responsible by virtue of superior responsibility’ for crimes against humanity and grave breaches of Geneva Conventions of 1949. Followed by the appeal by the Co-Prosecutors, granted in part, the PTC amended the closing order by adding the charges such as premeditated murder and torture as violations of the 1956 Penal Code of Cambodia (Duch closing order appeal decision (n 269)). For an even more extensive in Case 002, see Closing Order, Nuon Chea et al., Case File No. 002/19-09-2007-ECCC-OCIJ, OCIJ, ECCC, 15 September 2010 (‘Nuon Chea et al. closing order’), paras 18-1298.
293 Duch confessed to the CIJ, or did not contest, a lot of incriminating facts, among which ordering torture: Duch closing order (n 292), paras. 23, 30, 33, 37, 44, 47, 49-59 et seq., 90-9, and 167-70.
294 Art. 28(2) STL Statute; see further Chapter 1.
295 Aptel, ‘Some Innovations in the Statute of the STL’ (n 23), at 1117.
actor operating in the exclusive interest of justice.\textsuperscript{296} Essentially, the PTJ post unites the functions of a judge reviewing indictments before the \textit{ad hoc} tribunals with those of the PTJ at the ICTY (after the review of the indictment), and has a role in the investigations comparable to the ICC PTC. From a comparative viewpoint, the influence of civil law is apparent but the PTJ’s role is distinguishable from the status of \textit{juge d’instruction} adopted in Lebanon itself,\textsuperscript{297} since the bulk of investigations remain within the responsibility of the prosecutor and the defence.\textsuperscript{298} The following overview may show that the competences of the STL PTJ are broader than those of his closest analogues before other tribunals.

First, the STL PTJ may confirm or dismiss the indictment depending on whether the prosecutor has established a ‘\textit{prima facie} case’, and may request him to provide additional material for that end.\textsuperscript{299} Secondly, the PTJ exercises a variety of functions in relation to investigation. For one thing, this includes the exceptional gathering of evidence and questioning of anonymous witnesses.\textsuperscript{300} For the other thing, the PTJ exercises competences of oversight and facilitation of investigation. At the request of the Prosecutor, the PTJ may issue such orders and warrants for the arrest or transfer of persons or any other orders as may be necessary for the conduct of the investigation and for the preparation of a fair and expeditious trial.\textsuperscript{301} Furthermore, the PTJ takes measures to ensure the cooperation by states. Upon the prosecution request, he issues orders to the Lebanese judicial authorities seized with the investigation of the Hariri Attack to defer to the STL’s competence, to hand over to the prosecutor the results of investigations, a copy of the court record and probative material, and to submit to the PTJ a list of all persons detained in connection with the investigation.\textsuperscript{302} The PTJ also decides whether to direct the Lebanese judicial authorities to release with immediate effect any person detained in Lebanon in connection with the investigation into the Hariri Attack or to order the transfer of that person to the custody of the Tribunal and issue any appropriate order or warrant of arrest in this respect.\textsuperscript{303} Similarly, in cases when the person detained by the Lebanese authorities is within the jurisdiction of the STL, the PTJ shall decide whether to confirm the detention or to order release and on what conditions release can be granted.\textsuperscript{304}

Thirdly, after the indictment is confirmed, the STL PTJ exercises managerial competences in the effective preparation of the case for trial the responsibility for which he shares with the Trial Chamber.\textsuperscript{305} But unlike the PTJ at the ICTY, the STL PTJ is

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\item \textsuperscript{296} Explanatory Memorandum by the Tribunal’s President on the Rules of Procedure and Evidence, 12 April 2012 (‘STL RPE Explanatory Memorandum’), para. 14.
\item \textsuperscript{297} Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006, para. 32; STL RPE Explanatory Memorandum (n 296), paras 4 and 11-12 (referring to Arts 51-127 and 129, Lebanese Code of Criminal Procedure.
\item \textsuperscript{298} Arts 11(1) and (5), 13(2) and 16(4)(e) STL Statute.
\item \textsuperscript{299} Art. 18(1) STL Statute; Rule 68(F) and (I) STL RPE.
\item \textsuperscript{300} Rules 92-93 STL RPE. The PTJ may exceptionally, in the interests of justice, gather evidence at the request of a party or a participating victim if it has not been in a position to collect that evidence (Rule 92 STL RPE). The PTJ shall question anonymous witnesses in case of serious risks of endangering the witness or her family or jeopardizing imperative national security interests (Rule 93 STL RPE). See further STL RPE Explanatory Memorandum (n 296), para. 11.
\item \textsuperscript{301} Art. 18(2) STL Statute; Rules 68(J), 77-84, and 88 STL RPE.
\item \textsuperscript{302} Art. 4(2) STL Statute; Rule 17(A) STL RPE. E.g. Order Directing the Lebanese Judicial Authority Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case CH/PTJ/2009/01, PTJ, STL, 27 March 2009.
\item \textsuperscript{303} Rules 17(B), 63(A)-(D), 101(A) and (B) STL RPE. See Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, PTJ, STL, 29 April 2009 (ordering release of four individuals detained by Lebanese authorities).
\item \textsuperscript{304} Rules 88(B), 101(A) and (B) and 102 STL RPE.
\item \textsuperscript{305} Rules 89, 91, and 94-95 STL RPE. See also STL RPE Explanatory Memorandum (n 296), para. 11.
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institutionally autonomous from the Trial Chamber. The managerial functions of the PTJ include at that stage include: the coordination of the communication between the parties, ensuring that unnecessary delays are avoided, setting time-limits for the preliminary motions, hearing the parties and victims and recording the points of agreements and disagreements on matters of law and fact. The PTJ elaborates and implements the work plan meant to prepare the parties and victims for the Pre-Trial Conference conducted by the Trial Chamber. For that purpose, the PTJ shall order the prosecution to file the final version of its pre-trial brief along with the lists of its witnesses and exhibits with the appurtenant details, the victims – the lists of witnesses and exhibits they wish to be examined at trial, and the defence – their pre-trial brief. With a view to expeditious preparation for trial, the PTJ shall convene a status conference within eight weeks after the initial appearance and, thereafter, within eight weeks from the previous status conference. The PTJ may dispose of preliminary motions objecting to the refusal appointment of counsel as per Rule 59(A). Some other powers of the PTJ include the grant of the status of victims participating in the proceedings and ruling on matters concerning non-disclosure of confidential information affecting security interests of States and other international entities. The proceedings before the PTJ are completed with the submission of a complete case file to the Trial Chamber which from then on becomes seized with the case.

In turn, the Trial Chamber exercises the following pre-trial functions: convening the initial and further appearances of the accused before it, including entry of a plea, disposing of preliminary motions, and holding one or more inter partes pre-trial conferences (Rule 127) and pre-defence conferences (Rule 129). The conferences serve as venues for the Chamber to perform managerial measures upon the prosecution and defence cases respectively. Much like at the ICTY, at pre-trial conferences, the Chamber may: (i) call upon the prosecutor to shorten the estimated length of the examination-in-chief for some or all witnesses; (ii) determine the number of witnesses the prosecutor may call; and (iii) determine the time available to the prosecutor for the presentation of evidence. The Chamber will moderate the prosecution case on the basis of a complete file received from the PTJ, including the specific suggestions as to the number and relevance to be called by the prosecution and upon the request of participating victims.

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306 Arts 7-8 STL Statute. See also STL RPE Explanatory Memorandum (n 296), para. 4.
307 Rule 89 STL RPE.
308 Rule 91 and 127 STL RPE.
309 Rule 91(G) STL RPE. The Prosecution must file the documents required within a time limit established by the PTJ and not be less than 6 weeks before the Pre-Trial Conference.
310 Rule 91(H) STL RPE. Similarly to the prosecution documents, the filing by participating victims must be made within a time limit set by the PTJ and not later than 6 weeks before the Pre-Trial Conference.
311 Rule 91(I) STL RPE. The Defence must file their documents at latest three weeks before the Pre-Trial Conference.
312 Rule 94 STL RPE.
313 Rule 90(A)(iv) STL RPE.
314 Rule 86 STL RPE.
315 Rule 117 and 118 STL RPE.
316 Rule 95(B) STL RPE.
317 Rules 98-100 STL RPE. In addition to the motions raising objections based on the refusal of a request for assignment of counsel under Rule 59(A), it is within the TC’s competence to consider preliminary motions: (i) challenging jurisdiction; (ii) alleging defects in the form of the indictment; and (iii) seeking severance of counts or trials.
318 Rule 127(C) STL RPE.
319 Rule 95(A) STL RPE. A complete case file consists of: (i) all the filings of the parties and of the participating victims; (ii) any evidentiary material received by the PTJ; (iii) transcripts of status conferences; (iv) minutes of meetings held in the performance of the PTJ functions; (v) all orders and decisions PTJ has made; (vi) correspondence with relevant entities; (vii) a detailed report setting out the parties’ and victims’ arguments on the law and the facts; the points of agreements and disagreements, the probative material produced by each Party.
After the close of the prosecution case, the Chamber will perform similar case-management activities with respect to the prospective defence case, provided that the defence elects to present one. Before the pre-defence conference, the Trial Chamber shall order the defence to file: (i) a list of witnesses the defence intends to call with the relevant details concerning witnesses, their testimony, and the defence case in general; and (ii) a list of exhibits the defence intends to offer in its case, stating whether the prosecutor has objections to the exhibits’ authenticity. Prior to the defence case, the Chamber shall hold one or more *inter partes* pre-defence conferences, as needed. The purpose behind such Conferences is comparable to that of its analogue in the ICTY, ICTR, and SCSL context: to enable the Chamber to hand down directions for the conduct of a fair and efficient trial. Based on the Rule 128 submission of the defence, the Chamber may: (i) call upon the Defence to shorten the estimated length of the examination-in-chief for some or all witnesses; (ii) determine the number of the Defence witnesses; and (iii) determine the time available to the Defence for the presentation of evidence.

To conclude this overview, the purport and scope of the STL pre-trial process as conducted by the PTJ and Trial Chamber are not such as to encroach upon or detract from the truth-finding functions or decision-making prerogatives of the trial court. Even though the STL pre-trial process extends over a wide variety of procedural activities and grants the PTJ an unprecedentedly rich set of competences, the purpose of procedural measures comprised in the pre-trial are limited to ensuring an effective investigation, arrest and transfer of the accused, confirmation of the indictment, supervision over the legality of continued detention of persons in Lebanon and in the custody of the Tribunal, case management and the preparation of trial. In line with observations made earlier in relation to other courts, none of these pre-trial elements can in any way diminish the independent value of the examination of evidence at trial or foreshadow the Trial Chamber’s determination of the guilt or innocence of the accused. At least with respect to the relationship between the two stages, the traditional functions of the trial process and the normative role of trial in the STL context continue unscathed.

### 4. USE OF NEGOTIATED JUSTICE

As noted above, next to the character and purposes of the judicial pre-trial process, the role the trial phase plays in the context of a procedural system is determined by the framework governing the ‘negotiated’ or ‘consensual’ dispositions and the actual practice of recourse to these shortcuts in adjudication. In the domestic contexts, the uncontested avenue in the disposition of criminal cases comes in a variety of forms. Chapter 4 has shown that where the trial is—at least in theory—a centerpiece of the criminal process, the notion of the ‘prime stage’ is vulnerable to the practical reality of a broad resort to party negotiations resulting in the avoidance of contested trials in the majority of cases. The common-law guilty pleas and plea-bargaining are paradigmatic of this phenomenon. The relevance of these institutes to

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321 Rule 128 STL RPE. The attributes of and requirements to the defence’s lists of witnesses and exhibits are a mirror reflection of those applicable to the prosecution filings made earlier pursuant to Rule 91(G)(ii) and (iii) STL RPE.

322 Rule 129(A) STL RPE.

323 Rule 129(B) STL RPE.

324 Rule 129(C) STL RPE.

325 See also Joint Separate Opinion of Judge McDonald and Judge Vohrah, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22, AC, ICTY, 7 October 1997 (‘Erdemović appeal judgement’), para. 2 (referring to the concept of guilty pleas as ‘the peculiar product of the adversarial system of the common law’).
the discussion on the role of trial is seen from their legal effects. The need for a trial contest is obviated altogether; the court enters a guilty verdict based on a plea and proceeds to sentencing. Not only is the contest dispensed with, but also the core function of trial—establishing the truth—is supplanted by the court’s acceptance of a ready-made ‘truth’ contained in the factual basis for the plea agreement. The pervasion of guilty pleas and bargaining by necessity reduces the practical relevance of contested trials. For a guilty plea to have consequences for the trial, it is irrelevant whether it is a result of a plea agreement, but it can be assumed that a plea-bargaining system tends to increase an overall number of guilty pleas.

Elsewhere, negotiated justice does not—or rather for long time did not—pose major challenges to the relevance of trial as a vehicle of criminal adjudication. The role of the trial there was from the outset diminished by the premium placed on the pre-trial official investigation whose results enjoy a degree of deference on the part of the trial court. This emphasis transforms the trial into a ‘shadow phase’ to the pre-trial process and a forum for verification of the investigatory hypotheses flowing from the evidence in the case file, rather than a first-hand inquiry into the facts of the case with view to establishing the truth. The remote analogue in civil law is the institution of confession, which however does not result in the trial-avoidance: the admission of incriminating facts is merely treated as another piece of evidence.  

Lastly, the growing emphasis on the trial as the contentious proof-taking process governed by the principles of contradiction, immediacy and orality in some civil law jurisdictions led to the emergence of the middle-ground scheme where the negotiation takes place and results in a consensual outcome, but the trial is held in a substantially abbreviated form. Thus, in the last decades, procedures that amount to closer analogies with common-law guilty pleas have pervaded a number of Continental jurisdictions that previously resisted to them.

When it comes to international criminal justice, the semantically and culturally charged terminology of ‘guilty plea’ and ‘plea bargaining’, which originates in the Anglo-American legal tradition, should be used with caution. Generally, it is preferable to use the more neutral, albeit not necessarily more elegant, umbrella categories such as ‘consensual justice’ or ‘negotiated justice’. The arrangements in individual international tribunals are appropriately labelled as ‘guilty pleas’ and ‘plea bargaining’, provided that their legal effects justify such label. This section provides an overview of negotiated justice arrangements across international and internationalized criminal tribunals. It does so to assess what effects such arrangements have had for the importance of the trial in international criminal procedure by establishing the extent to which the recognition of negotiated justice in the procedural law of the tribunals and their resort to such arrangements in practice may have diluted the relevance of the trial.

On the one hand, the normative appraisal of the ‘conflict’ between negotiated justice and international criminal trials should be guided by the nominal criteria of its legal effects as envisaged in the statutes and RPE. In particular, the question is whether the court is relieved or prevented from conducting an inquiry into the facts after the admission of responsibility and/or of facts. On the other hand, the actual practice of recourse to the non-contestation avenue and the rate of cases disposed of via this route will gives another, more practical, perspective, on the impact of negotiated justice on international criminal trials. In light of

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326 Cf. Separate and Dissenting Opinion of Judge Cassese, Erdemović appeal judgement (n 325), para. 7 (‘[guilty plea] does not have a direct counterpart in the civil law tradition, where an admission of guilt is simply part of the evidence to be considered by the court’).

327 See Chapter 4.

328 The former term is broader in scope, as in addition to negotiated arrangements agreed among the participants, it encompasses any possible form of unilateral and non-prodded consent by the accused to the facts, without the element of explicit negotiation over the charges or the sentence. However, given that such consensual but non-negotiated outcomes are relatively marginal, the interchangeable use of these notions remains possible.
these questions, the following overview is as detached as possible and does not aim to
to pronounce on the pros and cons of negotiated justice in international criminal law. Chapter 5 has already dealt with the issue from the perspective of truth-finding as the key function of the trial and the criminal process in general. Such considerations are, however, of no relevance in the assessment of a potential or actual impact of consensual justice on the position of the trial phase in international criminal proceedings.

4.1 IMT and IMTFE

The opportunity for the accused to enter a plea of ‘guilty’ or ‘not guilty’ was integrated into the trial proceedings before both the Nuremberg and Tokyo IMTs. Their Charters contained articles regulating the course of the ‘proceedings at trial’ which prescribed that the making of a plea was to take place after the indictment was read in court and before the opening statements by the prosecution (IMT) or by the prosecution and each accused (IMTFE). But the legal frameworks were silent on the issue of plea bargaining. Besides, neither the IMT Charters nor their Rules of Procedure provided for the course of action to be followed in case of a guilty plea. Nor did they stipulate the legal consequences of such a plea and, in particular, whether the court were to take it as a confession only or as a procedural act dispensing with the need to present evidence.

However, one may draw some inferences from the common-law setup of the trial scheme in the IMTs. The patent wording of said provisions on pleading ‘guilty’ or ‘not guilty’ and the distinction between the judgment and sentence suggest that the legal implications of a plea would have been the same as at common law. It may well be that if any of the accused had pleaded guilty to a charge, the IMTs would have convicted him on that charge without hearing evidence—especially that the Nuremberg Tribunal heavily relied on affidavits—and would have subsequently rendered a sentence. But this remains in the realm of hypotheses – no accused at Nuremberg or Tokyo chose to plead guilty, for the reasons one may be tempted to speculate about. High-profile defendants in the dock were vigorously opposed to the idea of self-condemnation. Some of them remained loyal to the ideological cause of the Nazi regime or personally to the Führer (e.g. Rudolf Hess) and/or, like Hermann Göring, had no confidence in the Allied tribunal established for the trial of the vanquished and sought to employ the trial for grandstanding, which would be inconsistent with a plea of guilty. Others consistently maintained their individual innocence – and three of them were actually acquitted on all charges (Hjalmar Schacht, Franz von Papen, and Hans Fritzsche). At that stage of the development of international criminal justice, the charges put forward against them could certainly appear far-fetched and too vague in legal terms to plead guilty to, in the absence of any precedents. Irrespective of whether the defendants thought that they stand a chance of acquittal or perceived themselves as mere scapegoats singled out for a show trial with a predefined outcome, they had little to lose by choosing to deny guilt and to submit themselves to a contested trial. The novelty of the tribunals allowed no room for expectations.

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330 Art 24(b) IMT Charter (‘The Tribunal shall ask each Defendant whether he pleads “guilty” or “not guilty.”’); Art. 15(b) IMTFE Charter (‘The Tribunal shall ask each accused whether he pleads “guilty” or “not guilty.”’).

331 Arts 24(k), 26, and 27 IMT Charter; Arts 15(h), 16, and 17 IMTFE Charter.

332 In a similar vein, see Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 36), at 1459.
regarding the gains of pleading guilty such as those that can be based on the previous sentencing practice.

Another possible reason for the absence of guilty pleas at Nuremberg and Tokyo was the refusal on the part of the prosecution to consider plea negotiation as the acceptable avenue for disposing of the case. It is unlikely that the defence were ever approached with a plea offer as the prosecution would find bargaining with the alleged Nazi criminals to be a betrayal of their noble and necessary task, considering the high-ranking status of the defendants, the gravity and unprecedented nature of the charges, and the historical dimension of the trials. There had been no down-to-earth incentives to even consider a negotiated arrangement. The prosecution disposed of a treasure trove of incriminating evidence and was confident about its ability to obtain convictions. There was no real need for plea bargaining and abbreviated procedure on the institutional level because each of the Tribunals had a sufficient capacity to dispose of a single case, albeit featuring multiple defendants, through a full trial.

Consequently, all Nuremberg defendants, except for Martin Bormann who was tried in absentia, pleaded ‘not guilty’ when they were invited to enter a plea on the second day after the opening of the trial (21 November 1945). This scenario repeated itself before the IMFTE where all accused entered a plea of ‘not guilty’ on 6 May 1946. At Nuremberg, the pleas were entered following objections by two defence counsel to the effect that the Tribunal had not allowed their clients an opportunity to consult on the issue of the plea. Following a short break used for consultation, the first accused to plead was Göring, who attempted to read out a prepared statement (later made available to the press) but was stopped by Lord Presiding Justice Lawrence, and he then famously pleaded ‘Im sinne der Anklage nicht schuldig’ (‘in the sense of the indictment, not guilty’). This formulation was adopted by a few other defendants (Ribbentrop, Rosenberg, Schirach and Fritzsche), while others either formally pleaded ‘not guilty’ with some modifications or used a more pretentious language. Sauckel stated that he is not guilty ‘in the sense of the indictment, before the God and the world and particularly before my people’; Jodl embellished his plea with the assurance ‘for what I have done or had to do I have a pure conscience before God, before History and my People’; Schacht pleaded ‘not guilty in any respect’; and Papen – ‘in no way’.

The Anglo-American procedures were strictly followed at the stage of the entry of pleas. Whenever a plea had not been sufficiently articulate, the Nuremberg Tribunal put on the record that a plea of ‘not guilty’ was entered on behalf of the accused. At the IMT, this was the case with Hess, who shouted ‘Nein!’ in response to the question whether or not he considers himself guilty. Thereafter Presiding Justice Lawrence announced that it would be entered as a not guilty plea. The strong common law imprint on the IMT and IMTFE trial proceedings and the incorporation of the institute of guilty pleas may entail that such pleas would have likely had direct legal consequences for the conduct of the trial had they been made. In the absence of guilty pleas in those historical proceedings, however, the negotiated justice phenomenon cannot be deemed to challenge the overbearing role and relevance of the trial as the truth-finding forum at the dawn of international criminal justice. On the contrary, the presence of the guilty plea device in the Charters and its non-utilization make it a conspicuous fact that the contested trial was utterly significant and carried a symbolic meaning: none of the participants of the IMT and IMTFE process—the parties and the court—considered it necessary or indeed possible to sacrifice the full trial on the altar of efficiency.

335 Taylor, The Anatomy of the Nuremberg Trials (n 334), at 167; Tusa and Tusa, The Nuremberg Trial (n 334), at 150.
Chapter 6: Centrality of Trial

4.2 ICTY, ICTR, and SCSL

4.2.1 Guilty pleas: Nature and potential effects on trials

From the *ad hoc* tribunals’ inception, their respective Statutes expressly mandated the Trial Chamber ‘to instruct the accused to enter a plea’ prior to setting a date for trial and thus provided, in a cursory fashion, for the procedure to plead guilty.\(^336\) The following sentence, however, states that the Trial Chamber shall *then* set the date for trial. This language made the legal consequences of the guilty plea and its potential effects on the format of the trial uncertain. Thus, Article 20(3) of the ICTY Statute was characterized as ‘ambiguous’ as well as ‘vague and imprecise’, because it ‘may at first glance suggest that a trial shall be held even if the accused pleads guilty’.\(^337\) One commentator interpreted this language as indicating the intention of the drafters of the Statute to ‘not provide for the eventuality of guilty pleas being entered without subsequent trial’, which was effectively changed with the adoption of Rule 62.\(^338\)

ICTY Rule 62 regulated the initial appearance and imposed an obligation on the Trial Chamber to ‘call upon the accused to enter a plea of guilty or not guilty’ or, ‘should the accused fail to do so, [to] enter a plea of not guilty on his behalf’.\(^339\) In 1998, ICTY Rule 62(iii) was amended to stipulate that at the initial appearance, the Court shall inform the accused that he will be called upon to plead on each count within thirty days or that he or she may immediately enter a plea of guilty or not guilty on one or more count.\(^340\) A similar rule does not exist at the ICTR and SCSL whose Rule 62(A)(iii) and Rule 61(A)(iii) respectively allow no additional time to the accused to ponder on the plea and expect them to plead at the initial appearance. The ICTY, ICTR, and SCSL regimes are rigid when it comes to determining the course of action to be followed upon receiving a plea; the legal effects and the impact on the proceedings of both ‘guilty’ and ‘not guilty’ pleas are expressly stipulated. Self-evidently, a plea of not guilty results in a full-blown trial and the date for trial shall be set.\(^341\) A guilty plea is ensued by its judicial assessment in light of the relevant parameters, as discussed below, by a Trial Chamber, rather than by a single or designated judge, who shall refer the matter to the Chamber.\(^342\)

If a guilty plea is held to be valid, the Trial Chamber *may* enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.\(^343\) Subject to separate provisions in the ICTY and ICTR Rules, the sentencing procedure upon conviction based on a guilty plea allows the parties to submit to the Chamber any relevant information assisting it in

\(^{336}\) Art. 20(3) ICTY Statute; Art. 19(3) ICTR Statute. The SCSL Statute contains no similar provision.

\(^{337}\) Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* appeal judgement (n 325), para. 6.


\(^{339}\) Rule 62(iii) ICTY RPE (IT/32, 11 February 1994). See also Rule 62(iii) ICTR RPE (29 June 1995); and Rule 61(iii) SCSL RPE.

\(^{340}\) Rule 62(iii) ICTY RPE (IT/32/Rev. 14, 17 December 1998), at present Rule 62(A)(iii). This rule was amended on 4 December 1998 at the 19th plenary session in order ‘to provide the accused with an optional period of thirty days after the initial appearance in which to consider his or her plea’: Sixth Annual Report of the ICTY, UN Doc. A/54/187-S/1999/846, 25 August 1999, para. 112.

\(^{341}\) Rule 62(v) ICTY RPE; Rule 62(iv) ICTR RPE; and Rule 61(iv) SCSL RPE.

\(^{342}\) Rule 62(A)(v) ICTY RPE; Rule 62(B)(v) ICTR RPE; and Rule 61(v) SCSL RPE.

\(^{343}\) Rule 62bis ICTY RPE; Rule 62(B) ICTR RPE; Rule 62(B) SCSL RPE. In July 1998, the phrase ‘pre-sentencing hearing’ was replaced with ‘sentencing hearing’ because the former hearings were abolished as a result of the reform merging the judgment and sentencing stages, with separate sentencing hearings being retained only in guilty-plea cases. Cf. Rules 62bis and 100 ICTY RPE (IT/32/Rev. 12, 12 November 1997) with ICTY RPE (IT/32/Rev. 13, 9-10 July 1998). Before 8 June 1998, Rule 62(v) ICTR RPE (as amended on 6 June 1997) also referred to ‘pre-sentencing hearings’, which became ‘sentencing hearings’ after the 5th plenary session – see Rule 62(B) ICTR RPE (8 June 1998) and Third Annual Report of the ICTR (n 47), para. 15.
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determining the appropriate sentence.\textsuperscript{344} The sentence is to be pronounced ‘in a judgement in public and in the presence of the convicted person’.\textsuperscript{345} The formal procedure for the entry of a plea, its review by the court, and the effects of an accepted guilty plea invite a strong parallel with common law scheme, not the civil law notion of confession.\textsuperscript{346} Under the Rules and despite the ambiguity in the Statutes, the effects of a valid guilty plea appear to be such that, if entered and accepted by the Trial Chamber, the proof-taking stage of the trial is skipped and the case proceeds to a sentencing stage. This reflects the adversarial inclination of the ICTY, ICTR, and SCSL guilty-plea procedure.

However, there are at least two issues in their legal framework which may operate as ‘cracks’—or inquisitorial ‘Trojan horses’—in the seemingly adversarial scheme. First, it is important to consider what criteria a guilty plea must satisfy to be accepted by the court because this says much about its nature as either a legal formula or a factual admission. Secondly, the questions arises whether the use of the word ‘may’ as opposed to ‘shall’ in Rule 62\textit{bis} of the ICTY RPE and ICTR and SCSL Rule 62(B) endows judges with a power to disregard an accepted guilty plea and to order a contested trial instead. The following remarks will attend to these aspects.

Concerning the parameters of the validity of guilty pleas, neither the Statute nor the initial version of the ICTY and ICTR RPE provided any guidance in this respect. This proved problematic in the controversial Erdemović case which resulted in the first conviction obtained by the ICTY. Quite unexpectedly, this conviction was entered upon a guilty plea that was apparently motivated by remorse, rather than resulted from express bargaining between the parties, whereby the accused voluntarily provided valuable cooperation and the prosecution endorsed mitigation of sentence. Charged with one count of violations of the laws or customs of war and alternatively with one count of crimes against humanity, the accused pleaded guilty to the latter—graver—charge, but he used the language which could be interpreted as a defence of duress. Nevertheless, the Trial Chamber accepted the guilty plea, dismissed the alternative charge, convicted Erdemović, and handed down the sentence of ten years of imprisonment.\textsuperscript{347} The sentencing judgement was appealed and the issue of the requirements for a valid guilty plea came before the Appeals Chamber.

In its pioneer decision on the issue, the Appeals Chamber, ruling by majority, acceded to the preconditions for an admissible guilty plea elaborated upon in a joint separate opinion

\textsuperscript{344} Rule 100(A) ICTY and ICTR RPE. In contrast to the ICTY and ICTR, the SCSL retained a separate sentencing phase. Its Rule 100 on ‘Sentencing Procedure’ applies to both contested and uncontested cases. Rule 100(A) SCSL RPE allocates to the prosecution 7 days to submit the information relevant to sentencing and 7 days to the defence from the date of the prosecution’s submission. Rule 100(B) makes a distinction in sentencing procedure depending on whether the Chamber convicts the defendant after a trial or upon a guilty plea. In the former case, the TC may hear parties’ submissions at a sentencing hearing, in the latter case it is obligated to do so. Rule 100(C) SCSL RPE is identical to Rule 100(B) ICTY and ICTR RPE.

\textsuperscript{345} Rule 100(B) ICTY and ICTR RPE.

\textsuperscript{346} Joint separate opinion of Judge McDonald and Judge Vohrah, \textit{Erdemović appeal judgment} (n 325), para. 6 (The expressions “enter a plea” and “enter a plea of guilty or not guilty”, appearing in the Statute and the Rules which form the infrastructure for our international criminal trials imply necessarily, in our view, a reference to the national jurisdictions from which the notion of the guilty plea was derived. … Accordingly, we can see no impropriety in turning to the common law for guidance as to the proper meaning to be given to the guilty plea and for the necessary safeguards for its acceptance.’); Separate and Dissenting Opinion of Judge Cassese, \textit{Erdemović appeal judgement} (n 325), paras 7 and 10 (while the system of pleading guilty or not guilty to the charges is ‘clearly drawn from the criminal procedure of common law countries’, its meaning must be inferred from the ‘contemplation of the unique object and purpose of an international criminal court’). See also Ori, ‘Accusatorial v. Inquisitorial Approach’ (n 36), at 1467; Cryer \textit{et al.}, \textit{An Introduction to International Criminal Law and Procedure} (n 194), at 467.

\textsuperscript{347} Sentencing Judgement, \textit{Prosecutor v. Erdemović}, Case No. IT-96-22-T, TC I, ICTY, 29 November 1996 (‘Erdemović I trial sentencing judgment’).
of Judge McDonald and Judge Vohrah.\textsuperscript{348} Such preconditions drew heavily on the requirements applicable in the common law countries.\textsuperscript{349} By four votes to one, the sentencing judgement was reversed on the ground that the Trial Chamber had failed to appreciate an ill-informed character of the plea due to poor legal advice provided by counsel regarding the distinction between the two charges, and the case was remitted to another Trial Chamber.\textsuperscript{350} Erdemović entered a new plea of guilty to the war crimes charge before that Chamber and was sentenced to five years’ imprisonment.\textsuperscript{351} At that time, the Chamber not only had the advantage of the criteria set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, but it could also apply ICTY Rule 62\textit{bis} that was had been enacted in the meantime.\textsuperscript{352} In June 1998, an analogous Rule was adopted at the ICTR.

The original version of ICTY Rule 62\textit{bis} provided that, in order to be valid, a guilty plea must satisfy the cumulative criteria of being: (i) voluntary; (ii) not equivocal; and (iii) supported by ‘a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case’. The requirement that a guilty plea must be unequivocal, i.e. not accompanied by language which could be interpreted as putting forth any defence, best illustrates the ‘adversarial’ bend of the ICTY’s guilty-plea model that conceives of a plea as a procedural act or a legal declaration, rather than confession. In order to be accepted as valid, the accused’s ‘capitulation’ in the ‘contest’ and the acceptance of the guilty verdict must not be qualified by any defence or contradiction to the legal or factual basis stipulated in a plea agreement. Subsequently, the criterion (ii) was added providing that a guilty plea must be ‘informed’.\textsuperscript{353} It was formulated in the \textit{Erdemović} appeal but was absent from the initial version of Rule 62\textit{bis}. The present Rule 62(B) of the ICTR RPE reiterates the ICTY provision – it only adds the word ‘freely’ to the requirement (i) on the voluntary character of a plea and replaces the word ‘independent’ with ‘objective’ in the requirement (iv) concerning the ‘objective indicia’ in regard of the duty to establish ‘a sufficient facts for the crime and

\begin{itemize}
  \item \textsuperscript{348} Joint separate opinion of Judge McDonald and Judge Vohrah, \textit{Erdemović} appeal judgement (n 325), para. 8 (outlining the following ‘minimum pre-conditions’ to be satisfied before a plea of guilty can be entered: ‘(a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises. (b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty; (c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility.’).

  \item \textsuperscript{349} See e.g. Rule 11 (b) Federal Rules of Criminal Procedure (US); \textit{R. v. Turner} (1970) 2 Q.B. 321, 54 Cr. App. R. 352, (Eng. CA); \textit{R. v. T. (R.)} (1992), 10 O.R. (3d) 514 (Doherty J., Ontario CA), at 519 (‘To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequences of his plea.’).

  \item \textsuperscript{350} \textit{Erdemović} appeal judgement (n 325), para. 20. Judges Cassese and Stephen also held the first plea to be ambiguous, given that in international criminal law duress may amount to a complete defence to the charge of killing innocent persons: see Separate and Dissenting Opinion by Judge Cassese, \textit{Erdemović} appeal judgement (n 325), para. 12; Separate and Dissenting Opinion of Judge Stephen, \textit{Erdemović} appeal judgement (n 325), para. 66.

  \item \textsuperscript{351} \textit{Sentence Judgement, Prosecutor v. Erdemović}, Case No. IT-96-22-This, TC II ter, ICTY, 5 March 1998 (‘\textit{Erdemović} II trial sentencing judgement’), at 23.

  \item \textsuperscript{352} Rule 62\textit{bis} ICTY RPE (IT/32/Rev. 12) was adopted at the 18th plenary session on 12 November 1997: Fifth Annual Report of the ICTY (n 52), para. 105. See \textit{Erdemović} II trial sentencing judgement (n 351), paras 9-10.

  \item \textsuperscript{353} The requirement was added at the 19th plenary session (December 1998) and entered into force on 17 December 1999: cf. Rule 62\textit{bis} ICTY RPE (IT/32/Rev. 13, 9-10 July 1998) with Rule 62\textit{bis} ICTY RPE (IT/32/Rev. 14, 17 December 1998) and see Sixth Annual Report of the ICTY (n 340), para. 109. The amendment is mentioned in the Sixth Annual Report at para. 112, which provides no comment on the reasons for the omission of the requirement in the initial version and its subsequent inclusion little over one year after. Arguably, the requirement was added to bring Rule 62\textit{bis} in line with Art. 65(1) ICC Statute, then recently adopted: see Roberts, ‘Aspects of the ICTY Contribution to the Criminal Procedure of the ICC’ (n 338), at 567-8.
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accused’s participation in it.’ 354 Finally, SCSL Rule 62 adopts the formulation of the ICTR Rule, save for the latter modification.

The ICTY, ICTR, and SCSL judges wield some discretion in determining whether a guilty plea is valid, as seen in particular from the requirement of ‘sufficient factual basis’. The inquiry into facts is normally limited to any material disagreement between the parties. 355 However, the ‘objective indicia’ limb of the test is elastic enough to accommodate different understandings. It may range from a statement on its face consistent with whatever little facts known to the judges about the case to the one that should be thoroughly corroborated, consistent, and reflect the ‘totality’ of criminal conduct alleged in the indictment, including the adequacy of a legal label affixed to the misconduct. Such a standard of review is certainly more rigorous than that typical of a common-law court. 356 The depth of the judges’ assessment of a guilty plea in light of ‘sufficient factual basis’ depends on how they perceive their role in truth-finding and how extensive their previous knowledge is. They may decline to accept a guilty plea where some ‘independent’ or ‘objective’ indicia point to the insufficiency or other sort of inadequacy of the basis underlying the plea. In that case, the Chamber may hold that it is not satisfied of the factual basis as agreed by the parties, request clarifications, or proceed to trial on the relevant charge in order to clarify the agreed facts that invite doubt. 357

Some ICTY Chambers have indeed construed Rule 62bis as authorizing them not only to poke any inconsistencies or disagreements between the parties, but also to turn a plea down whenever the agreement and the statement of facts failed to reflect the ‘totality’ of the alleged criminal conduct or were not in conformity with the objectives of international criminal justice (e.g. individual criminal responsibility, contributing to a credible historical record, and victim redress). 358 This interpretation provided judges with a tool of controlling bargained outcomes and to veto deficient deals which they saw as misrepresenting facts rather than promote the truth. The depth of inquiry into facts has varied by Chamber and by case. But

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354 Cf. precursor Rule 62(v) ICTR RPE (as amended on 8 June 2000) and Rule 62(B)(iv) ICTR RPE (27 May 2003).
356 Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1382.
357 Sentencing Judgement, Prosecutor v. Sikirica et al., Case No. IT-95-8-S, TC III, ICTY, 13 November 2001 (‘Sikirica et al. trial sentencing judgment’), para. 48 (‘In arriving at a decision as to whether it is … satisfied [as to the sufficient factual basis, the Chamber is not confined to a consideration of the facts as agreed between the Prosecution and the Defence, because its fundamental obligation is to ensure that there is a sufficient factual basis for the crime and the accused’s participation in it. Thus, if the Chamber is dissatisfied or is for any reason uncertain about any of the facts as agreed between the parties, the Chamber may conduct a trial on that particular issue for the purpose of determining those facts.’); Judgement on Sentencing Appeal, Prosecutor v. Deronjić, Case No. IT-02-61-A, AC, ICTY, para. 16 (‘Because the Trial Chamber found discrepancies with the Factual Basis, it was appropriate and indeed necessary under the plain language of Rule 62bis(iv) of the Rules for the Trial Chamber to look beyond the Plea Agreement Package to other evidence as “independent indicia” in order to satisfy itself that there was a sufficient factual basis for the guilty plea.’).
358 Sentencing Judgement, Prosecutor v. Obrenović, Case No. IT-02-60-2/S, TC I, Section A, ICTY 10 December 2003 (‘Obrenović trial sentencing judgment’), para. 19 (‘the acceptance of a guilty plea pursuant to a plea agreement must follow careful consideration by a trial chamber of numerous factors including inter alia whether the remaining charges reflect the totality of an accused’s criminal conduct, whether an accurate historical record will be created, whether the terms of the agreement fully respect the rights of the accused, and whether due regard is accorded to the interests of victims’); Sentencing Judgement, Prosecutor v. M. Nikolić, Case No. IT-02-60-1-S, TC I, Section A, ICTY, 2 December 2003 (‘M. Nikolić sentencing judgment’), paras 52 (‘In determining whether a sufficient factual basis for the crime exists, a trial chamber may find it necessary to ask the Prosecution to adduce additional or supporting evidence, or may ask the accused specific questions to clarify his particular conduct or involvement in the commission of the crime to which he has pled guilty. In questioning about the factual basis, a trial chamber may seek to ensure that the totality of the accused’s criminal conduct is reflected and that an accurate historical record exists, as well as ensure that the accused is pleading guilty to no more than that for which he is, in fact, guilty.’), 65-6.
there was a tendency to take the requirement of ‘sufficient factual basis’ more seriously and to examine the agreed facts against the facts initially alleged in the indictment and any additionally requested evidence. In several cases, judges have rejected the initial agreement, requesting further clarifications or rectification of the defects in the representation of facts or in legal qualifications. Thus, what amounts to a ‘valid’ guilty plea in the ICTY regime gives room for interpretation and therefore gives judges a significant leeway to reject a guilty plea on factual grounds. Where the Chamber’s inquiry into the factual basis is more than superficial, this aspect may in practice dilute the ‘adversarial’ character of the guilty-plea procedure.

The second similar aspect, as noted above, relates to the language of Rule 62bis ICTY RPE and Rule 62(B) of the ICTR and SCSL RPE to the effect that where the Chamber is satisfied that the conditions for a guilty plea are met, it ‘may’ enter a finding of guilt. The question arises whether this means that a Chamber may refuse to enter a finding of guilt, as if a valid guilty were not made, and order that a trial on the relevant charge should proceed under a regular arrangement. One ICTY Trial Chamber has ruled that it retains discretion to reject a guilty plea which satisfies the four pre-requisites under Rule 62bis where the plea agreement does not correspond to the ‘interests of justice’. It is questionable whether such an interpretation is plausible. Rules provide neither for the principles governing such discretion, nor for the specific circumstances in which the Chamber may disregard a ‘valid’ guilty plea. There have been no cases at the ICTY or ICTR in which a guilty plea formally held to satisfy the relevant criteria was turned down to opt for the contested trial. As opposed to the aforementioned practice of challenging the factual basis for the plea, the judges have not applied ICTY Rule 62bis or ICTR Rule 62(B) in the way that confirmed their supposed prerogative to reject a valid guilty plea, or they did not deem it necessary to use the same by preferring a full trial over the finding of guilt based on a plea.

The Chambers have normally considered themselves bound by a guilty plea, including the legal characterizations and factual basis agreed between the parties, in determining the further course of action, without being bound by a sentencing recommendation. Where the

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360 Sentencing Judgement, Prosecutor v. Deronjić, Case No. IT-02-61-S, TC II, ICTY, 30 March 2004 (‘Deronjić sentencing judgment’), paras 28-9 (the TC requested further clarifications in view of discrepancies between the indictment and ‘Factual Basis’) and 35-9 (after the sentencing hearing the TC revisited the testimony of the accused in other trials in light of the indictment and ‘Factual Basis’, found ‘substantial material discrepancies’ and decided to hold a ‘continued sentencing hearing’); Sentencing Judgement, Prosecutor v. Babić, Case No. IT-03-72-S, TC I, ICTY, 29 June 2004 (‘Babić sentencing judgment’), paras 6-8 (after the Chamber ‘expressed doubts about the accuracy of the legal characterization of Babić’s acts in the plea agreement as an aider and abettor of a JCE’, the agreement was modified and the accused pleaded guilty as a co-perpetrator of a JCE); Sentencing Judgement, Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-S, TC II, ICTR, 17 November 2009 (‘Bagaragaza sentencing judgment’), para. 8.
361 M. Nikolić sentencing judgment (n 358), para. 54 (‘The Trial Chamber recalls the language of Rule 62 bis: after satisfying itself that the four pre-requisites for accepting a guilty plea have been met, a trial chamber “may” enter a finding of guilt. Thus, a trial chamber has discretion whether to accept a guilty plea. While the reason for not accepting a guilty plea may be that a trial chamber is not satisfied with the terms of the plea agreement or has concerns that the rights of the accused have not been adequately protected, a trial chamber may also reject a particular guilty plea based on a plea agreement because it does not consider that the plea agreement is in the interests of justice.’); Obrenović trial sentencing judgment (n 358), para. 20.
362 Sentencing Judgement, Prosecutor v. D. Nikolić, Case No. IT-94-2-S, TC II, ICTY, 18 December 2003 (‘D. Nikolić trial sentencing judgment’), para. 48 (‘Having accepted a guilty plea on the basis of a plea agreement, a Trial Chamber operating in a party-driven system such as the ICTY is thereafter limited to what is specifically contained in, or annexed to, the plea agreement. Simply put, the Trial Chamber cannot go beyond what is contained in a plea agreement with regard to the facts of the case and the legal assessment of these facts.’); Judgement on Sentencing Appeal, Prosecutor v. M. Nikolić, Case No. IT-02-60/1-A, AC, 8 March 2006, para. 12 (‘Although there can be exceptions, Trial Chambers are in principle limited to the factual basis of the guilty plea, set forth in such documents as the indictment, the plea agreement and a written statement of facts.’) – footnote
accused pleaded guilty to some charges and not guilty to the others and where his guilty plea was validated by the court, the cases would normally disposed of as a whole. Guilty pleas have often resulted from plea-bargaining that purported to reach a settlement enabling the parties to bypass the trial altogether without leaving any charges for the contentious mode. So charges on which the accused pleaded not guilty would normally be dismissed. In *Bisengimana*, the ICTR Trial Chamber accepted the guilty plea regarding aiding and abetting the commission of murder and extermination as crimes against humanity and granted the prosecution motion for withdrawing and dismissing the counts on which the accused pleaded not guilty. The motion for acquittal on those counts because the OTP ‘had failed to justify its motion on this point’. In *Rutaganira*, however, acquittals for the lack of evidence were entered, as requested by the prosecution. Similarly, in *Jelisić*, the Chamber deferred the judgment of conviction following the guilty plea to the charges of war crimes and crimes against humanity until having heard the prosecution evidence relating to the charge of genocide to which the accused had pleaded not guilty and on which he was acquitted at the close of the prosecution case. This is explained by the fact that the guilty plea in that case did not result from plea-bargaining, so the parties did not reach an agreement on all charges.

In the ICTY and ICTR, the accepted, i.e. valid, guilty pleas unavoidably led to the Chamber entering the finding of guilt. As a mandatory shortcut to conviction, it necessarily results in the complete avoidance of trial. This confirms that the *ad hoc* tribunals’ predominant conception of a guilty plea—modelled upon a common-law institute—is embedded into the adversarial philosophy which allows the parties to take out their ‘dispute’ out of hands of the court where they are in agreement on the facts and the outcome of the case. Characteristically, the first ICTY Chamber to ever pronounce on the guilty plea referred to it as an element of defence strategy. Furthermore, both tribunals have routinely endorsed the formula featuring in most plea agreements that interprets a guilty plea as a voluntary waiver by the accused of his or her entitlement to a (fair) trial and the minimum rights which he or she would have otherwise. This includes the right to be presumed innocent until proven otherwise beyond reasonable doubt, to testify or to remain silent, to cross-examine the prosecution witnesses, and the right to appeal the verdict and any preceding rulings. Thus,

| Omitted; | Sikirica et al. sentencing judgment (n 357), para. 49 (‘once a Trial Chamber enters a finding of guilt, it should, unless there are cogent reasons indicating otherwise, impose a sentence that is based on the agreed fact.’). |
| 363 E.g. M. Nikolić sentencing judgment (n 358), paras 11 and 53 (the TC declined to accept the first plea agreement because the OTP did not agree to dismiss the remaining charges until the time of sentencing just in case the accused withdraws his plea). |
| 364 Judgment and Sentence, Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, TC II, ICTR, 13 April 2006 (‘Bisengimana sentencing judgment’), para. 25. |
| 365 Ibid. |
| 366 Judgment and Sentence, Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, TC III, ICTR, 14 March 2005 (‘Rutaganira sentencing judgment’), para. 16 and at 34, |
| 367 See e.g. Judgement, Prosecutor v. Jelisić, Case No. IT-95-10-T, TC I, ICTY, 14 December 1999 (‘Jelisić trial judgment’), paras 14-15 (the TC considered pronouncing its judgment on the guilty plea and sentencing with respect to the war crimes and crimes against humanity charges before proceeding to trial on the genocide charge, but the defence moved for there to be a single judgment; the prosecution evidence was heard and Jelisić was acquitted on that charge under Rule 98bis following the close of the prosecution evidence and ‘without even needing to hear the arguments of the Defence’). |
| 368 Erdemović I trial sentencing judgment (n 347), para. 13 (‘the choice of pleading guilty relates not only to the fact that the accused was conscious of having committed a crime and admitted it, but also to his right, as formally acknowledged in the procedures of the International Tribunal and as established in common law legal systems, to adopt his own defence strategy. The plea is one of the elements which constitute such a defence strategy.’) |
| 369 Joint separate opinion of Judge McDonald and Judge Vohrah, Erdemović appeal judgement (n 325), para. 8; Sikirica et al. sentencing judgment (n 357), para. 17; Obrenović trial sentencing judgment (n 358), para. 15; M. Nikolić sentencing judgment (n 358), para. 48; Bisengimana sentencing judgment (n 364), para. 20; Sentencing Judgement, Prosecutor v. Rugambarara, Case No. ICTR-00-59-T, TC II, ICTR, 16 November 2007, para. 6. |

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as a matter of legal framework, guilty pleas, whether or not preceded by bargaining, have strong effects on the shape of trial process: the court shall convict the accused where it accepts the guilty plea as meeting the required standard.

### 4.2.2 Plea-bargaining and actual impact

Still, the entering of a plea of guilty is contingent on the willingness of the accused to condemn himself and to bypass a contested trial. Whether the guilty-plea practice will in fact have a strong impact on the format of adjudication and lead to trial-avoidance in the majority of cases depends on the degree to which the procedural regimes of the tribunals effectively encourage the defendants to plead guilty in exchange for lenience or embody factors which on the contrary undermine the guilty-plea system. The essential factor conducive to the increased occurrence of guilty pleas in the system is plea-bargaining. The regulation of and attitude towards agreements on facts, charges and sentencing recommendations between the parties determine the degree of deference accorded by the judges to the agreed outcomes that emerge from plea agreements. The higher the chance that the court will endorse a plea agreement, the greater the certainty the parties have as to the success of their bargaining arrangements. In that case, the prosecutor will be in a stronger bargaining position and can offer the accused concessions in certainty that the court will not exceed the sentencing recommendation, whereas the accused will have a stronger incentive to enter into plea-bargaining with the prosecution and follow it through by concluding an agreement. The assessment of the practice regarding guilty pleas in the *ad hoc* tribunals therefore requires a brief look into their actual capacity as procedural systems to generate pleas of guilty, considering that a of a plea-bargaining system depends essentially on its predictability.

The history of the institute of plea-bargaining and its use at the ICTY and ICTR indicate that the attitude to negotiated justice in those tribunals was ambivalent and fluctuating with time. Such attitude progressed from its complete rejection to experimental use by the parties and compelled acceptance by the judges, and ultimately to formalization and a fairly wide use at a certain period, without, however, becoming a majority phenomenon in those tribunals. The Statutes and the initial ICTY and ICTR Rules did not provide for a possibility of plea-bargaining. The judges’ comment on the first version of the ICTY Rules even posited the absence of negotiated settlements from the Rules as the one of the three major intended deviations of the ICTY from the adversarial systems.\(^\text{370}\) The ICTY prosecutor’s guideline on non-prosecution of accomplices who provide cooperation was never applied and was eventually abrogated.\(^\text{371}\)

The main reason for the initial rejection of plea-bargaining was the notion that the tribunal set up to establish the truth and to eradicate impunity for international crimes should not allow the alleged perpetrators to evade full responsibility and to benefit from lenience in exchange for their services to the prosecution such as a plea of guilty to lesser charge or evidence against other accused.\(^\text{372}\) Arguably, granting ‘immunity’ from prosecution on the

\(^{370}\) First Annual Report of the ICTY, A/49/342-S/1994/1007, 29 August 1994, para. 74. Noting the deliberate omission of plea bargains in the then ICTY legal framework and the lack of ‘endorsement or acknowledgement by the Chambers’, see Separate and Dissenting Opinion of Judge Cassese, *Erdemović* appeal judgement (n 325), para. 10 (‘both the Statute and the Rules deliberately do not make provision for plea bargaining—or, at least, of any endorsement or acknowledgement by the Chambers of out-of-court plea bargaining. This means, among other things, that the framers of the Statute and the Rules aimed at averting those distortions of the free will of the accused which may be linked to plea bargaining.’).


\(^{372}\) Statement of the President Made at a Briefing to Members to Diplomatic Missions, IT/29, 11 February 1994 (ICTY President Cassese: ‘this Tribunal is not a municipal court but one that is charged with the task of trying persons accused of the grassest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due
dropped charges is inconsistent with the obligation to prosecute and punish (or extradite) individuals alleged to have committed international crimes established by the relevant international treaties, even though one may question whether such a duty applies to international criminal courts.\textsuperscript{373} Perhaps even more importantly, the ‘distasteful’ plea-bargaining device was also objectively ‘unnecessary’ in the start-up stage given that the tribunals did not have many accused in the dock and hence there was no significant pressure to expedite these cases by resorting to bargaining.\textsuperscript{374}

The early practice of the \textit{ad hoc} tribunals reflects these views.\textsuperscript{375} The very first convictions at the ICTY and ICTR ensued valid guilty pleas.\textsuperscript{376} As noted, the first guilty plea at the ICTY, by Erdemović, did not result from plea-bargaining concluding in an express deal that stipulates the benefits to be received by the defendant in exchange for his guilty plea and extensive cooperation provided, including testifying in the \textit{Karadžić and Mladić} Rule 61 hearing.\textsuperscript{377} The first ICTR convict—Jean Kambanda, the Prime Minister of the interim government of Rwanda during the genocide—did conclude a plea agreement, apparently believing he would obtain a sentencing discount as a matter of course. Accordingly, he had started providing extensive cooperation to the prosecution even before signing the agreement, which furthermore explicitly stated that the parties had made no ‘no agreements, understandings or promises’ concerning the sentence.\textsuperscript{378} Thus, the guilty pleas in these cases had not been secured through an explicit promise of concessions on the part of the prosecution, although there may have been an expectation to that effect, at least on the part of Kambanda. Hence, one is bound to question whether plea-bargaining in the traditional understanding had taken place.

Similarly, the second guilty plea at the ICTY, in the case of Goran Jelisić who pleaded guilty to sixteen counts of war crimes and fifteen counts of crimes against humanity but not the single genocide count as charged in the amended indictment,\textsuperscript{379} was not a result of plea-bargaining in a traditional sense.\textsuperscript{380} The eight counts of war crimes and crime against humanity had been dropped, but, according to Combs, this had been done for evidentiary reasons as opposed to rewarding the accused for his plea; furthermore, the guilty plea on thirty-one counts had been made in light of the overwhelming evidence and on the mistaken belief—and at odds with the defence counsel’s advice—that it would be qualified as a substantial cooperation and would be taken into account in mitigation.\textsuperscript{381} But the prosecution made no concessions and sought the imposition of life imprisonment, which indicates that it regarded the plea and the underlying ‘Agreed Factual Basis’ as a capitulation, not a bargained outcome. The Trial Chamber did not accord Jelisić with any lenience in light of his plea, since it sentenced him to forty years in prison.\textsuperscript{382}

\begin{footnotesize}
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\item \textsuperscript{373} See Scharf, ‘Trading Justice for Efficiency’ (n 329), at 1074-5. See also \textit{M. Nikolić} sentencing judgment (n 358), para. 65 (‘the principle of mandatory prosecutions is not part of the Tribunal’s Statute’).
\item \textsuperscript{374} Combs, \textit{Guilty Pleas} (n 329), at 59 (‘a distasteful and unnecessary procedural device.’).
\item \textsuperscript{375} Commentators related the ICTY’s initial adherence to the no-plea-bargaining policy to the leadership of President Cassese who was succeeded in 1999 by US Judge McDonald, marking the era of a greater tolerance to negotiated justice. E.g. Scharf, ‘Trading Justice for Efficiency’ (n 329), at 1073; Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1378.
\item \textsuperscript{376} \textit{Erdemović} I sentencing judgment (n 347), paras 3 and 10; Judgement and Sentence, \textit{Prosecutor v. Kambanda}, Case No. ICTR 97-23-S, TC I, ICTR, 4 September 1998 (‘\textit{Kambanda trial judgment}’), paras 4 and 5.
\item \textsuperscript{377} \textit{Erdemović} I sentencing judgment (n 347), para. 7.
\item \textsuperscript{378} See Combs, \textit{Guilty Pleas} (n 329), at 92.
\item \textsuperscript{379} \textit{Jelisić} trial judgment (n 367), paras 10-11 and 24.
\item \textsuperscript{380} See also \textit{M. Nikolić} sentencing judgment (n 358), para. 46 n86 (‘in the case of both Erdemović and Jelisić, the first guilty plea appears to have preceded any plea negotiations between the parties.’).
\item \textsuperscript{381} Combs, \textit{Guilty Pleas} (n 329), at 61-2.
\item \textsuperscript{382} \textit{Jelisić} trial judgment (n 367), paras 124-34 and 138-9. See \textit{ibid.}, para 134 (‘the aggravating circumstances far outweigh the mitigating ones and this is why a particularly harsh sentence has been imposed on him.’).
\end{itemize}
\end{footnotesize}
The two guilty pleas at the ICTR in the wake of Kambanda, in the cases of Omar Serushago and Georges Ruggiu, presented a more flexible approach to negotiated justice as bargaining had taken place in those cases. In both cases, cooperative and seemingly repentant accused pleaded guilty to some or all charges, even though the prosecution did not promise—and could not promise indeed—any sentencing discounts to be granted by the court. Plea agreements had been signed between the parties, the sentences as recommended by the prosecution and handed down by the court were more lenient than life, and the sentencing judgments acknowledged some mitigating circumstances, including the guilty pleas and substantive cooperation of the accused with the prosecution. These cases thus marked a shift towards the growing acceptance of negotiated justice, namely sentence-bargaining, first by the prosecution and then by the Chambers.

The shift in the attitude vis-à-vis negotiated justice soon spread to the ICTY whose entire post-Jelisić guilty-plea practice was firmly premised on the classic plea-bargaining that featured agreements stipulating concessions to be made by the prosecutor, such as promises to drop charges and to recommend lower sentences in exchange for a plea of guilty. This had in part been due to the individual circumstances which invited negotiation between the parties. The case of Stevan Todorović—in which the ‘pure’ form of plea-bargaining had first been employed at the ICTY—is the example of such special situation. In that case, the defendant held a real ‘bargaining chip’ – his illegal arrest and rendition. Todorović had been abducted at his home in Serbia and Montenegro by unknown individuals and delivered to Stabilization Force (SFOR) in Bosnia and Herzegovina. The Chamber satisfied his request to order SFOR and constitutive NATO states to provide him with the information concerning his arrest, which would have been highly inconvenient for the powerful allies of the Tribunal. In order to save the court the trouble, the prosecution made an attractive plea offer promising to recommend a sentence within the range of five to twelve years and to drop twenty-six out of twenty-seven counts against Todorović, whereas the accused committed to plead guilty to one count of crimes against humanity (persecution) and to withdraw his challenge to the legality of his arrest. The Chamber acknowledged the conditions of the plea agreement and rendered the sentence within the recommended range (ten years’ imprisonment), expressing its tacit endorsement of the settlement and the blessing of plea-bargaining as an institute.

This case opened a ‘floodgate’ of bargained guilty pleas at the ICTY, with several dispositions ensuing shortly. Besides the contingencies of specific cases and on the level of the institution, the acceptance of plea bargaining became a response to the ever-growing quality of the defence counsel and increasing length and volume of trial and administrative ‘problems’ these developments created in view of the overcrowded case docket and the deadlines of the Completion Strategy. In this light, the enactment in December 2001 of ICTY

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383 Sentence, Prosecutor v. Serushago, Case No. ICTR-98-39-S, TC I, ICTR, 5 February 1999 (‘Serushago sentence’), para. 4 (at his initial appearance on 14 December 1998, Serushago pleaded guilty to four of the five counts of genocide and crimes against humanity, but not to one count of rape as a crime against humanity, which was withdrawn by the prosecution); Sentence, Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, TC I, ICTR, 1 June 2000, para. 4 (at his initial appearance on 25 October 1997, Ruggiu pleaded not guilty to the two counts of direct and public incitement to commit genocide and crimes against humanity (persecution) and to withdraw his challenge to the legality of his arrest. The Chamber acknowledged the conditions of the plea agreement and rendered the sentence within the recommended range (ten years’ imprisonment), expressing its tacit endorsement of the settlement and the blessing of plea-bargaining as an institute.

384 For a detailed discussion, see Combs, Guilty Pleas (n 329), at 94-7.

385 Serushago sentence (n 383), paras 31-3, 39 (imposing twenty-five years’ imprisonment against the OTP’s recommended fifteen-year sentence); Ruggiu trial judgment (n 383), para. 81 (the OTP recommended a single concurrent sentence of twenty years for each of the counts while the ultimate sentence handed down was twelve years’ imprisonment for each count, to be served concurrently).


387 Combs, Guilty Pleas (n 329), at 62.


Chapter 6: Centrality of Trial

Rule 62ter explicitly providing for plea-bargaining was a logical step towards the formalization of practice and legalization of negotiated settlements.\(^{390}\) In fact, the rule was adopted upon the initiative of the prosecution and it sought to provide guidance to the participants to the ICTY procedure not well-versed in this practice.\(^{391}\) Nearly one and half years later, an identical rule was adopted by the ICTR.\(^{392}\) By contrast, the SCSL Rules contain no similar provision. According to the virtually identical ICTY and ICTR rules, the parties may agree that, where the accused enters a plea of guilty to the indictment or to one or more counts, the prosecutor may do one or more of the following: (i) apply to amend the indictment accordingly; (ii) submit that a specific sentence or sentencing range is appropriate; or (iii) not oppose a request by the accused for a particular sentence or sentencing range.\(^{393}\) The Rule makes clear that both sentence-bargaining and charge-bargaining are allowed. It also expressly provides that no deal between the parties shall be binding upon the Trial Chamber, as recognized in the early jurisprudence on guilty pleas following an agreement.\(^{394}\) The judges conceived of their review of the plea agreements giving rise to guilty pleas as a mechanism enabling them to exercise their ‘ultimate authority’ over the conduct of the proceedings.\(^{395}\)

The judicial tolerance to plea-bargaining, combined with the compelling demands of the Completion Strategy endorsed by the UNSC, provided incentives for the prosecution at both ad hoc tribunals to seek to increase the guilty-plea rate. The prosecutors became more agreeable with the idea of bargaining, including in cases which at an earlier stage would have been likely to go to trial. While a detailed overview of these cases cannot be afforded here, suffice it to say that it is the wide resort to plea-bargaining that accounts for the ‘guilty-plea boom’ at the ICTY. For example, in 2003 the number of cases disposed of through guilty pleas equaled the number of guilty pleas that had been entered in the entire preceding period of the ICTY operation.\(^{396}\) In 2004-2007, that trend waned producing no more than one guilty-plea judgment per year, with the last guilty-plea judgment entered in 2007 and not a single guilty plea made in the ICTY’s last six years.\(^{397}\) By contrast, no comparable explosive growth

\(^{390}\) Rule 62ter ICTY RPE (IT/32/Rev. 22, 13 December 2001), adopted at the 24\(^{th}\) plenary session (12-13 December 2001). See Ninth Annual Report of the ICTY (n 113), paras 37 and 41 (mentioning the rule but providing no further details).

\(^{391}\) M. Nikolić sentencing judgment (n 358), para. 46 (‘The Rule was proposed by the Prosecution to establish a formal procedure for a practice which was already somewhat established. It was thought that by having a procedure in the Rules for plea agreements, it would give guidance to all parties and the accused, who often come from systems where plea agreements are not common or not used at all.’).

\(^{392}\) Rule 62bis ICTR RPE. The rule was adopted at the 13\(^{th}\) plenary session held on 26-27 May 2003. See Eighth Annual Report of the ICTR, UN Doc. A/58/140–S/2003/707, 11 July 2003, para. 6 (referring to the plea agreement procedure as one of the essential amendments introduced ‘in order to facilitate the proceedings’).

\(^{393}\) Rule 62ter(A) ICTY RPE; Rule 62bis(A) ICTR RPE.

\(^{394}\) Rule 62ter(B) ICTY RPE; Rule 62bis(B) ICTR RPE. See e.g. Erdemović II sentencing judgement (n 351), para. 19 (while not bound by the plea agreement, the Chamber may take it into careful consideration in determination of the sentence to be imposed).

\(^{395}\) M. Nikolić sentencing judgment (n 358), para. 49 (‘while the parties have the autonomy to enter into plea agreements, the trial chambers retain the ultimate authority over both the process and the proceedings.’).


\(^{397}\) Babić sentencing judgment (n 360), paras 6-12; Sentencing Judgement, Prosecutor v. Bralo, Case No. IT-95-17-S, TC ICTY, 7 December 2005, para. 3; Sentencing Judgement, Prosecutor v. Rajić, Case No. IT-95-12-S, TC I, ICTY, 8 May 2006, paras 8-9; and Sentencing Judgement, Prosecutor v. Zelenović, Case No. IT-96-23/2-S, TC I, ICTY, 4 April 2007, paras 10-13.
of guilty pleas, followed by recession, could be observed at the ICTR, where the average rate of guilty pleas in the same period did not exceed one per year, with the last guilty-plea conviction ensuing as late as in 2009.\textsuperscript{398} It must be noted that save for one contempt case,\textsuperscript{399} no guilty pleas have been entered at the SCSL. According to the information obtained during personal interviews with SCSL defence counsel and prosecutors, negotiations had been conducted with some defence teams but nowhere had those succeeded. The offers were deemed unacceptable by the defendants because the crimes alleged were characterized by extraordinary depravity and because they were unwilling to testify against other defendants which whom they had bonded during their detention in Freetown.\textsuperscript{400}

The significant growth of guilty-plea rate at the ICTY gives a reason for a pause and may have to do with a number of reasons. First, in accordance with the Completion Strategy, no more indictments could be brought after 2004, which was the deadline set for the completion of all investigations.\textsuperscript{401} The priority was to complete the ongoing trials, rather than abruptly interrupt and do away with any ongoing trials via plea-bargaining route. In addition, cases that did not deserve the tribunals’ attention because they did not focus on the ‘most senior leaders suspected of being most responsible for crimes’ were referred to the respective national jurisdictions under Rule 11bis which prevented the case docket from growing incrementally. This removed somewhat the urgency of pressing for negotiated dispositions in each case, which may indeed appear paradoxical in the heyday of the Completion Strategy.

Secondly and on a related note, it is only toward the end of its mandate that the ICTY acquired custody over high-profile fugitive defendants, including Ante Gotovina, Radovan Karadžić, Ratko Mladić, and Goran Hağić. Given the historical significance of these cases and their special niche in the ICTY’s legacy and mission, the prosecutors may have been understandably unwilling to consider plea-bargaining. The prosecutors may not have wished the repetition of the critique that followed the bargained disposition of the case of the former member of the Presidency of Republika Srpska Biljana Plavšić who was sentenced to eleven years in prison, resulting in the withdrawing of a genocide charge.\textsuperscript{402} They were not (anymore) prepared to make concessions of such a character as to persuade the high-profile accused to plead guilty.\textsuperscript{403}

\textsuperscript{398} Rutaganira sentencing judgment (n 366), paras 14-7; Judgement and Sentence, Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, TC I, ICTR, 12 June 2006, paras 3-11; Bisengimana sentencing judgment (n 364), para. 12; Nzabirinda sentencing judgment (n 355), paras 9-14; Ruganharara sentencing judgment (n 369), paras 4-9; Bagaragaza sentencing judgment (n 360), para. 44.


\textsuperscript{400} E.g. Interview with Prosecutor, SCSL-AP-01, 22 October 2009, at 10 (‘It cannot be said that there has not been any engagement between the Prosecution and Defence. There was one case where there was active dialogue until there was a change of counsel. So it is not that the Prosecution has not made attempts.’); Interview with Wayne Jordash, Defence Counsel, SCSL-OD-01, The Hague, 8 December 2009, at 17 (‘We negotiated on guilty pleas but it did not work out, our client did not want it.’); Interview with Defence Counsel, SCSL-AD-02, 22 October 2009, at 12 (‘I do not think that was an option.’); Interview with Defence Counsel, SCSL-AD-06, 19-20 October 2009, at 35 (‘There was a real sense of bonding together, and part of any plea bargain agreement would have also been to testify against the other. So you have people feeling they are not guilty, having to testify against people they are now locked up with, and have been locked up with for several months, without guarantee that they are ever actually not going to get a worse sentence than if testified; and also, it is in the country. They have families here. They were not about to plead guilty to things like amputations, for example. ... For political and practical reasons, amputation is a very important charge, and my client was not willing to plead to that. ...’); Interview with Defence Counsel, SCSL-AD-03, 22 October 2009, at 11 (‘I think they approached the second defendant, ... but I was not approached. Maybe they knew the answer.’).

\textsuperscript{401} See Chapter 3, section 5.


\textsuperscript{403} See also Interview with Prosecutor, SCSL-AP-01 (n 400), at 10 (‘I totally accept the position of the Prosecution in being very cautious about approaching them with plea bargaining.’)
Thirdly, the defendants themselves seem to have felt dissuaded from pleading guilty and invariably chose to have a contested trial instead, given the previous experience of similar practice and in particular given the fact that the sentencing discounts could not be guaranteed.\(^{404}\) That said, the impact of (guaranteed) sentencing discounts should not be overestimated because a host of situation-specific factors, including the nature and gravity of crimes or the cultural and ideological background of the accused, tend to play an even more important role.\(^{405}\) Thus, unlike their high-profile predecessors (e.g. Biljana Plavšić and Milan Babić), the ‘latecomer’ accused at the ICTY were all determined to maintain their innocence – and at least in the case of Gotovina, that has proved to be the right strategy.\(^{406}\) The absence of special individual circumstances found in the previous guilty-plea cases, the utmost gravity of the charges put forth by the prosecution, the negative advice of defence counsel,\(^{407}\) and the typical unwillingness of ‘political’ defendants to plead guilty,\(^{408}\) must all have played a role.

The fourth and arguably the most crucial factor has been the persistent judicial disbelief about the appropriateness of plea-bargaining. At the ICTY, the practice continued to be viewed with unrelenting suspicion by the judges even in the middle the 2003 guilty-plea boom even despite the adoption of ICTY Rule 65ter. On the one hand, judges have praised the use of guilty pleas for a host of practical and principled reasons related to the tribunal’s broader mission. The first and foremost benefit, resource-saving, was praised by the divided Erdemović Appeals Chamber and on numerous occasions thereafter.\(^{409}\) The juxtaposition of the length of proceedings in the cases of similarly situated defendants who entered different pleas is instructive. The case of Biljana Plavšić was disposed definitively in little more than two years from the date of her transfer to the ICTY and within five months from her plea; no

\(^{404}\) Combs, ‘Procuring Guilty Pleas for International Crimes’ (n 402), at 99-100.

\(^{405}\) Ibid., at 79.


\(^{407}\) Interview with Defence Counsel, SCSL-AD-06 (n 400), at 35 (‘anyone who has been involved in international criminal law as a defence lawyer is very cautious and hesitant in their advice to clients, because you have to bring up what happened to Kambanda and the fact that he had made so many sacrifices, he had given evidence, and he still ended up with life imprisonment. I think the fact that there are no guarantees, that you can make whatever agreement you want with Prosecution, but in no circumstances is that necessarily going to be honoured by the Court, makes it such a risk to go in for a guilty plea, particularly when your client is not pro it anyway.’).

\(^{408}\) On ‘political’ defendants, see Chapter 5. To the same effect, see Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1378 (‘Defendants who had served as political or military leaders were more likely to be ideologically opposed to admitting guilt.’).

\(^{409}\) Separate and Dissenting Opinion of Judge Cassese, Erdemović appeal judgement (n 325), at 3 (‘by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. … Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relative officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage.’); Joint separate opinion of Judge McDonald and Judge Vohrah, Erdemović appeal judgement (n 325), para. 2 (‘The concept of the guilty plea per se is the peculiar product of the adversarial system of the common law which recognises the advantage it provides to the public in minimising costs, in the saving of court time and in avoiding the inconvenience to many, particularly to witnesses. This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.’). See also Todorović sentencing judgement (n 388), paras 80-1; Plavšić sentencing judgement (n 396), para. 73; Banović sentencing judgment (n 396), paras 67-8; Mrđa sentencing judgment (n 396), para. 78; D. Nikolić sentencing judgment (n 396), para. 121; Češić sentencing judgment (n 396), para. 59; Rugamburara sentencing judgment (n 369), para. 35.
By contrast, the case of Momčilo Krajišnik who had also held a position in the collective Presidency of Republika Srpska and was charged with similar offences jointly with Plavšić, took some nine years to finish through contested trial. This vividly demonstrates that consensual dispositions, particularly when entered into in the early stage of the case, are apt to promote judicial economy and efficiency. The other advantages of guilty pleas cited in the case law included: their direct contribution to the tribunal’s fundamental purpose of punishing perpetrators, countering the denial of crimes through the acceptance of responsibility, assistance in the effort of prosecuting (high-ranking) accused in other cases, contributing to the establishment of the truth, restoration of peace, bringing reconciliation, and the satisfaction of victims as a result of the recognition of guilt and especially when attended by sincere expressions of remorse, and sparing victims the experience of reliving highly traumatic events when called to testify.

On the other hand, as opposed to ‘pure’ guilty pleas abstracted from the ways by which they are secured, the attitude to plea-bargaining has been mixed at best. The judges have questioned the appropriateness and legitimacy of bargained outcomes in light of the objectives of the tribunal – including the mandates for the prosecution and punishment of the gravest crimes, the assistance with the establishment of the historical record, and bringing justice to the victims. Certain forms of bargaining, especially those leading to the serious charges being dropped (and most often resulting in a reduced sentence), were deemed to call for ‘extreme caution’. Such agreements tacitly impinged upon the authority of the judicial

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410 Plavšić was transferred to the ICTY on 10 January 2001; pleaded not guilty to all charges at the initial appearance next day; changed the plea to guilty as regards persecutions on 2 October 2002. The sentencing judgement was delivered of 27 February 2003.

411 Krajišnik was transferred to the ICTY on 3 April 2000; pleaded not guilty to all charges at the initial appearance on 7 April 2000; the trial started on 3 February 2004, with the trial judgement delivered on 27 September 2007 and the appeal judgement on 17 March 2009.

412 M. Nikolić sentencing judgment (n 358), para. 69; Serugendo sentencing judgment (n 398), para. 55.

413 M. Nikolić sentencing judgment (n 358), para. 70; Obrenović trial sentencing judgment (n 358), para. 20; Plavšić sentencing judgement (n 396), para. 73; D. Nikolić sentencing judgment (n 396), para. 121; Deronjić sentencing judgment (n 360), para. 3; Deronjić trial sentencing judgment (n 360), para. 134.

414 M. Nikolić sentencing judgment (n 358), para. 71; Obrenović trial sentencing judgment (n 358), para. 20.

415 M. Nikolić sentencing judgment (n 358), para. 72; Obrenović trial sentencing judgment (n 358), paras 20 and 111; Mrđa sentencing judgment (n 396), para. 79; Plavšić sentencing judgement (n 396), paras 73 and 80; D. Nikolić sentencing judgment (n 396), paras 3, 121 and 233; M. Jokić sentencing judgment (n 396), paras 76-7; Deronjić trial sentencing judgment (n 360), para. 134; Česić sentencing judgment (n 396), para. 58; Kambanda trial judgment (n 380), para. 50; Judgement and Sentence, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, TC I, ICTR, 6 December 1999, para. 146; Serugendo sentencing judgment (n 398), para. 55; Rutagamira sentencing judgment (n 366), para. 146; Serugendo sentencing judgment (n 398), paras 32, 55-9; Rugamburara sentencing judgment (n 369), para. 35.

416 Obrenović trial sentencing judgment (n 358), para. 20; M. Nikolić sentencing judgment (n 358), paras 20 and 111; Todorović sentencing judgment (n 388), para. 70; Mrđa sentencing judgment (n 396), para. 78; M. Jokić sentencing judgment (n 396), para. 76; Rutaganda trial judgment (n 415), para. 146; Serugendo sentencing judgment (n 398), para. 32; Bisengimana trial judgment (n 364), para. 131; D. Nikolić sentencing judgment (n 396), para. 121; Deronjić trial sentencing judgment (n 360), para. 134; Česić sentencing judgment (n 396), para. 58.

417 M. Nikolić sentencing judgment (n 358), paras 57-67 (the TC raising and discussing ‘some concerns about the use of such agreements in cases which come before the Tribunal’) and 73 (‘on balance, guilty pleas pursuant to plea agreements, may further the work – and the mandate – of the Tribunal’; however, the use of plea agreements should proceed with caution and such agreements should be used only when doing so would satisfy the interests of justice.’); D. Nikolić sentencing judgment (n 396), para. 122 (‘a plea agreement pursuant to Rule 62 ter and 62 bis of the Rules does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to the people of the former Yugoslavia. Neither the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement.’); Deronjić trial sentencing judgment (n 360), para. 135.

418 M. Nikolić sentencing judgment (n 358), para. 65 (‘Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor make a plea agreement such that the totality of an individual criminal conduct is not reflected or the remaining charges do not sufficiently reflect the gravity of the offences
confirmation of the charges under the *prima facie* standard and ‘implicated’ the unwilling judges in the deals to which they resisted. The related concern about plea agreements responsible for some judicial discomfort has been the risk of unequal treatment of the defendants and the possible discrimination among them given their different bargaining positions. The top-ranking accused alleged to be the ‘most responsible’ are normally able to provide most valuable cooperation, for example, by testifying as insider witnesses against others defendants, whereas the mid- and low-ranking defendants may not always be in a position to do so due to their lack of access to insider’s information. Accordingly, political and military leadership accused are more likely to be approached by the prosecution with attractive plea offers and to secure a more lenient sentence than other categories of the accused.

Last but not least, some judges were particularly vocal in expressing their displeasure with the consequences of plea agreements on the truth-finding as that practice, even when conducted within the legal framework, was seen to take away from the epistemological objective of international criminal proceedings and result in an incomplete truth. Accordingly, the ‘truth’ emerging from the guilty pleas is treated as a second-rate forensic material. Seen as inconsistent with high-quality justice the tribunals were expected to deliver and their broader mandates, the plea-bargaining practice essentially fell (back) into a normative disrepute and, ultimately, decline. The single positive aspect of the plea-bargaining practice the judges were prepared to recognize was that it helps save valuable time and resources, but this is qualified by statements that this ‘cannot be given undue

committed by the accused, questions will inevitably arise as to whether justice is in fact being done. The public may be left to wonder about the motives for guilty pleas, whether the conviction in fact reflects the full criminal conduct of the accused and whether it establishes a credible and complete historical record.’; *Obrenović* trial sentencing judgment (n 358), para. 20 (‘The Trial Chamber determined that the guilty plea of Dragan Obrenović pursuant to the Plea Agreement was in the interests of justice and therefore accepted his guilty plea on 21 May 2003. The Trial Chamber’s determination was based on the following factors, inter alia: … (e) the fact that the Prosecution did not withdraw any factual allegations related to the criminal conduct for which Dragan Obrenović accepted individual criminal responsibility.’); *D. Nikolić* sentencing judgment (n 396), para. 122.

420 421 See e.g. *M. Nikolić* sentencing judgment (n 358), para. 48 n89 (‘it is critical that no member of the trial chamber participates in or assists in any manner the discussions related to a possible guilty plea; judges must remain impartial. Furthermore, as judges are the guarantors of an accused’s rights, including the right to be presumed innocent, participation in any discussions towards an accused pleading guilty may be inconsistent with a judge’s obligation and duty to protect an accused’s rights at trial, in the event that the plea negotiations fail.’).

422 *M. Nikolić* sentencing judgment (n 358), para. 66 (‘the Trial Chamber has a responsibility to ensure that all accused are treated equally before the law. The Prosecutor may seek to make a plea agreement with some accused because of their knowledge of particular events which may be useful in prosecutions of other, more high ranking accused. The Prosecutor may make the terms of such a plea agreement quite generous in order to secure the co-operation of that accused. Other accused, who may not have been involved in the most egregious crimes or who may not have been part of a joint criminal enterprise with more high ranking accused, may not be offered such a generous plea agreement, or indeed any plea agreement.’).

423 On the truth-finding and plea-bargaining, see further Chapter 5, section 3.3.2. See, in particular, Dissenting Opinion of Judge Wolfgang Schomburg, *Deronjić* trial sentencing judgment (n 360), paras 4-5 (‘the series of indictments, including the Second Amended Indictment, arbitrarily present facts, selected from the context of a larger criminal plan and, for unknown reasons, limited to one day and to the village of Glogo\'va only’) and 9-11.


425 *M. Nikolić* sentencing judgment (n 358), para. 67 (‘The quality of the justice and the fulfilment of the mandate of the Tribunal, including the establishment of a complete and accurate record of the crimes committed in the former Yugoslavia, must not be compromised. Unlike national criminal justice systems, which often must turn to plea agreements as a means to cope with heavy and seemingly endless caseloads, the Tribunal has a fixed mandate. Its very raison d’être is to have criminal proceedings, such that the persons most responsible for serious violations of international humanitarian law are held accountable for their criminal conduct – not simply a portion thereof.’).
consideration or importance’ and should not be the main rationale for entering into plea negotiations. This is paradoxical or even contradictory, given that cost-saving and efficiency are the only real reasons for plea-bargaining. In any event, these judicial sentiments were not only material but may also have effectively sealed the fate of the negotiated justice practice at the ICTY. The judges are the ones who set the tone for the use of this practice and exert a powerful influence on the way in which the parties approach their procedural tasks. It is not difficult to see why ‘desperate’ plea-bargaining ended up being unattractive business for the prosecution towards the end of the ICTY and ICTR mandates.

Following this overview, one is bound to return to the initial question about the actual impact of consensual outcome and negotiated justice on the normative significance of the trial as the mechanism for case-disposition. This question can only be answered by looking at the figures reflecting the proportion of uncontested dispositions vis-à-vis contested trials at the ICTY and ICTR; the SCSL ought not to be considered due to the lack of practice. At the time of writing, twenty ICTY accused have pleaded guilty out of 157 defendants whose trial proceedings have been concluded. The rate is thus no more than 13% (12.73%) of all processed cases. At the ICTR, the rate has been slightly lower – nine accused have pleaded guilty out of seventy-four defendants in the genocide cases in which the trial proceedings have been completed (guilty-plea rate 12.1%).

To sum up, the ad hoc tribunals’ legal frameworks, as interpreted by most Chambers (with some exceptions), envisage guilty pleas as the institute modeled upon a common-law concept of a legal declaration which, if and when accepted by the court, is binding in terms of legal consequences, including the status of the defendant and the further course of the proceedings. While the court may be less or more active in verifying the factual basis for the guilty plea, its intervention into the agreement on fact will seldom be far-reaching due to the judges’ limited knowledge of the facts in the case. The implication is that a valid guilty plea results in the disposition of the case, whereby the full contested trial with the presentation of evidence is bypassed, the finding of guilt entered, and the sentence handed down. The truth is established by agreement of the parties as stipulated in the factual basis for the plea and the decision on the guilt is passed by the defendant himself, rather than by the court. This form of negotiated justice implies strong effects on the format of trial and is nominally capable of

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424 Ibid., para. 67 (‘while savings of time and resources may be a result of guilty pleas, this consideration should not be the main reason for promoting guilty pleas through plea agreements.’).

425 The ICTY accused in core crimes cases who have pleaded guilty are (in the chronological order): Dražen Erdemović (31 May 1996 and 14 January 1998), Goran Jelisić (29 October 1998), Stevan Todorović (13 December 2000), Duško Sikić (4 September 2001), Dragan Kolundžija and Damir Došen (19 September 2001), Milan Simić (15 May 2002), Biljana Plavšić (2 October 2002), Momir Nikolić (7 May 2003), Dragan Obrenović (21 May 2003), Predrag Banović (26 June 2003), Darko Mrda (24 July 2003); Miodrag Jokić (27 August 2003); Dragan Nikolić (4 September 2003); Miroslav Deronjić (30 September 2003); Ranko Češić (8 October 2003), Milan Babić (22 January 2004), Miroslav Bralo (19 July 2005), Ivica Rajić (26 October 2005), and Dragan Zelenović (17 January 2007).

426 The total number of accused whose trial proceedings have been concluded is composed of 136 accused whose proceedings (both trial and appeal) have ended and twenty-one accused whose cases are currently under appeal and who will therefore have no opportunity to change their plea to guilty. For the current information on these figures, see ICTY, Key Figures of ICTY Cases, available at <http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf> (accessed on 3 September 2013).

427 The nine ICTR accused who have pleaded guilty are (in the chronological order): Jean Kambanda (1 May 1998); Omar Serushago (14 December 1998); Georges Ruggiu (15 May 2000); Vincent Rutaganira (8 December 2004); Joseph Serugendo (15 March 2005); Paul Bisen Gimana (7 December 2005); Joseph Nzabirinda (7 December 2005); and Michel Bagaragaza (17 September 2009).

428 The total number of ICTR core crimes (rather than contempt) cases with the trial proceedings (74) is composed of 46 persons convicted, 16 pending appeal, and 12 acquitted. See ICTR, Status of Cases, <http://www.unictr.org/Cases/tabid/204/Default.aspx> (last accessed 3 September 2013). The ICTR webpage does not indicate that Michel Bagaragaza pleaded guilty, but in fact the total number of guilty pleas at the ICTR is nine and not eight.
undermining the relevance of the trial phase as the locus for truth-finding and decision-making.

However, this nominal approach should be complemented by the empirical or statistical insight, namely whether the guilty-plea practice at the ICTY and ICTR has in fact diminished or undermined the primary role of the trial phase as the vehicle for truth-finding. The conclusion is that it has not, because of the limited ability of plea bargaining to ensure consensual dispositions in most cases due to the normative objections to negotiated justice in the tribunals context. Even though the number of guilty pleas was quite high at the ICTY in a relatively short period of time, reaching its peak in 2003, the overall rate of no more than 13% confirms that trials have indeed been the predominant mode of disposing of the cases before the tribunals. In their context, the resort to negotiated justice did not come even nearly close to the rate found, for example, in the common-law countries (well over 90%).

4.3 ICC

The ICC procedural model incorporates the institute of ‘admission of guilt’. Being analogous to both guilty pleas and confessions, it is an artificial construction that attempts to combine the two concepts and has a hybrid nature. Article 64(8)(a) of the Statute provides that at the commencement of trial, after having read out the charges confirmed and having satisfied itself that the accused understands them, the Trial Chamber shall ‘afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty’. The Trial Chamber is thus the sole organ competent to solicit and receive an admission of guilt. The term ‘admission of guilt’, as opposed to a ‘plea of guilty’ at common law and ‘confession’ or ‘admission of facts’ at civil law, indicates the intention of the drafters to avoid direct analogies with national legal systems. However, the formulation of the alternative option (‘plead not guilty’) stills points to the adversarial influence and may leave the nature of the concept unclear. The hybrid institution of ‘admission of guilt’ and said incoherence ought to be viewed in light of the negotiating history which on this issue, as on many others, was overshadowed by the rift between common law and civil law.

The text of Article 65 grew out of Article 38(1)(d) of the ILC Draft Statute and was shaped by the aspiration of various delegations to the Preparatory Committee to combine the procedures of the two legal traditions.

Where an admission of guilt is made by the accused, three options provided for under the Statute present themselves. First, whenever satisfied that an admission meets the criteria of validity specified in Article 65(1), the Trial Chamber may follow the route prescribed in Article 65(2).

Article 65(1) establishes the following conditions for the acceptance of the admission of guilt: '(a) The accused understands the nature and consequences of the

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429 See further Chapter 4.
431 M. Bohlander, ‘Plea-Bargaining before the ICTY’, in May et al. (eds), Essays on the ICTY Procedure and Evidence (n 177), at 157.
432 Outlining the drafting history of Article 65 ICC Statute, see H.-J. Behrens, ‘The Trial Proceedings’, in Lee (ed.), The Making of the Rome Statute (n 237), at 242-3; Guariglia/Hochmayr, ‘Article 65’ (n 430), at 1220-1. The ILC provision provided for a traditional guilty plea scheme but was not specific as to the consequences of a guilty plea, while the ILC Commentary on the Draft Statute provided that a guilty plea would not automatically result in conviction and would be subject to further determination by the Chamber. The first proposal for the improvement of Art. 38(1)(d) at the Preparatory Committee made by Australia and the Netherlands (Working Paper, UN Doc. A/AC.249/L.2, Rule 74) was that the common-law version should be followed more closely, whereby the Court could proceed directly to sentencing in case of a valid guilty plea. This was rejected by other delegations, mainly from civil-law counties, who were uncomfortable with the ‘strong’ effects of guilty pleas as well as with the prospect of plea bargaining at the ICC. The positions by various delegations are recapitulated in Report of the Preparatory Committee on the Establishment of an International Criminal Court, UNGAOR, 51st Session, Supp. No. 22, UN Doc. A/51/22 (1996), Vol. I, at 56.
admission of guilt; (b) The admission of guilt is voluntarily made by the accused after sufficient consultation with defence counsel; and (c) The admission of guilt is supported by the facts of the case’. This provision reflects the parameters of validity of a guilty plea adopted in Erdemović and subsequently codified in ICTY Rule 62bis and ICTR Rule 62(B), except for the requirement that the guilty plea not be equivocal. Arguably, the omission of that requirement makes a valid admission of guilt compatible with defences listed in Article 31 and, therefore, in contrast with a classic guilty plea, the admission of guilt is not merely a formal waiver of one’s participation in the adversarial contest but more of a factual statement.

The course of action prescribed in case of a valid admission is that the Chamber ‘shall consider the admission of guilt, together with additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime’. When not satisfied that the admission meets the necessary requirements, the Chamber shall regard it as not having been made, in which case it shall order the trial to be continued under the ordinary trial procedure and may remit the case to another Trial Chamber. This implies that the admission is to be struck from the case record and no prejudice ensues. Finally, the same course of action may be opted for even where the formal requirements have been held to be satisfied, and this is the fundamental difference of the ICC admission of guilt from the common-law guilty plea. In particular, whenever the Chamber is of the opinion that a more complete presentation of the facts of the case is required ‘in the interests of justice, in particular the interests of victims’, the Statute leaves open the possibility for the Chamber either to request the prosecutor to present additional evidence, including witness testimony, or to follow the route of Article 65(2), i.e. to reject the admission as not having been made and order that the trial be continued under ordinary procedure, presumably before another Trial Chamber. This option vests the ICC judges with more extensive powers over the consensual justice process and outcomes than the powers the ad hoc tribunals’ judges have had. In deciding whether to proceed under Article 65(4), the Chamber may invite, but is not bound by, the views of the prosecution and the defence. Any preferences held by the parties regarding the avenue to be followed in case of consensual disposition may further be qualified by the views of the participating victims which may be solicited by the Chamber, which is of course supposed to duly consider such views.

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433 Joint Separate Opinion of Judge McDonald and Judge Vohrah, Erdemović appeal judgement (n 325), para. 8.
434 Discussing the omission of this caveat as an intended departure from the US legal test, see Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 36), at 1481.
435 Art. 65(2) ICC Statute.
436 Art. 65(2) ICC Statute.
437 Guariglia/Hochmayr, ‘Article 65’ (n 430), at 1230; Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1392.
438 P. Lewis, ‘The Rules of Procedure and Evidence of the International Criminal Court: Confirmation Hearing to Trial’, in Fischer et al. (eds.), International and National Prosecution of Crimes Under International Law 229 (this may be required to order to establish aggravating circumstances).
439 Art. 65(4) ICC Statute. Rule 139 ICC RPE further provides that in order to make a decision under Art. 65(4), the Trial Chamber may invite the views of the prosecutor and the defence; the decision must be reasoned and put on the record. See P. Lewis, ‘Trial Procedure’, in R.S. Lee et al. (eds), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Ardsley, NY: Transnational Publishers, 2001) 547 (noting that this ‘relatively unimportant’ rule reflects a conceptual difference among delegations as to whether the Court should only possess powers explicitly conferred on it by the Statute or the Rules).
440 Combs, Guilty Pleas (n 329), at 59.
441 Rule 139(1) ICC RPE.
442 Rule 93 ICC RPE (‘A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rule[…] … 139’).
Chapter 6: Centrality of Trial

As noted, in comparative terms, admission of guilt is a unique hybrid construct. While it is grounded on the common-law guilty pleas, it also departs from that concept in important respects and incorporates civil-law features. First, taking the hint from the structure of the admission-of-guilt procedure and subject to any future interpretation to be given by the Court, the ‘factual basis’ requirement is more apt to reflect the civil-law idea of confession, being one item of evidence, rather than a purely legal declaration of guilt. Accordingly, no accused is likely to be convicted on a charge on the strength of the admission alone and, where such an admission is made, it may be more difficult for the accused to simply withdraw the admission, given its likely substantial factual underpinning. The utmost importance of the factual basis is emphasized by the language of Article 65(2) which, in stipulating the effect that attaches to a valid admission of guilt as a basis for conviction, provides that the Chamber ‘may consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts required to prove the crime’. The Chamber is thus expected to satisfy itself that not a single ‘essential fact’ need to prove the crime beyond reasonable doubt is missing in the admission and evidence.

Secondly, the judicial power to request additional materials from the prosecutor or to reject the admission of guilt where the interests of justice, including the interests of the victims, require a more complete presentation of the case is odd to a common-law eye. It restricts the autonomy of the parties in relation to take their ‘dispute’ out of the hands of the adjudicator and to bypass the evidence presentation. More in line with inquisitorial principles of judicial inquiry, the ICC admission of guilt does not have to amount to an ‘act of surrender’ by the accused in the ‘trial contest’ leading automatically to conviction. As argued by some commentators, the serious nature of the crimes under the ICC jurisdiction and the need to expose the whole truth about the relevant facts independently of the parties’ decision make the ICC model preferable to that of the ad hoc tribunals in that ‘[i]t adopts the practical advantages of the common-law tradition and at the same time enables the Court to fulfil its task of publicly establishing the truth in whatever detail necessary.’ Indeed, some ICTY Chambers were clearly influenced by the consideration of the benefits offered by the ICC’s open-textured concept when formulating their attitude to plea-bargaining and interpreting the ICTY Rules.

The consequence of these features of the admission of guilt procedure for the role and relevance of the trial phase before the ICC, is that its nominal effects are weaker than those of guilty pleas in the ad hoc tribunals. In addition to the possibility of accepting an admission that satisfies the parameters of Article 65(1), the Court has the power to demand the presentation of the additional evidence pursuant to Article 65(4)(a), or to decline to accept the admission which meets formal criteria of validity and order that the trial be continued. While in the former case, the trial is likely to fall short of a full trial as it will consist only in the presentation of the prosecution evidence, the latter avenue does entail a regular contested trial. Therefore, a formally valid admission of guilt accepted by the Court as such does not automatically result in the elimination of the trial phase and hence not a legal circumstance which per se affecting the format of trial. The possibility—and arguably the duty—of taking into account the interests of justice and of the victims will require the Trial Chamber to

443 H.-D. Bosly, ‘Admission of Guilt before the ICC and in Continental Systems’, (2004) 2 JICJ 1040, at 1047; Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1392 (‘Despite the ambiguity of the term “admission of guilt”, it appears to come closer to a factual admission of guilt rather than a formal declaration like a “guilty plea” or “acceptance of the charges”. If that is how the court interprets it, admissions of guilt may be more difficult to retract than guilty pleas.’)

444 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 36), at 1481.

445 M. Nikolić sentencing judgment (n 358), paras 54 (asserting the power to reject a valid guilty plea ‘in the interests of justice’) and 64 (noting Art. 65 ICC Statute).


deliberate on whether sacrificing a full-blown trial is appropriate or, instead, whether the admission should be deemed as not having been made and the evidence must be heard.\[^{448}\] Hence, as a matter of the legal framework, the ICC trials run lesser potential risks on the account of consensual or negotiated dispositions than the trial phase of the proceedings before the ad hoc tribunals. This conclusion is bound to be tentative because of the lack of actual admission-of-guilt practice before the ICC so far. In the four ICC trials which reached the stage of ‘commencement of the trial’ at the time of writing, the six accused concerned have pleaded not guilty to the charges confirmed.\[^{449}\] Moreover, an abbreviated procedure following an admission of guilt and resulting in a conviction remains a possibility under Article 65(2).\[^{450}\]

The previous section has illustrated the link existing between the permissibility and legal implications of plea negotiations between the parties, on the one hand, and the possible number of guilty pleas in the system, on the other hand. This issue should be addressed in the context of the ICC. Neither the Statute nor the Rules regulate plea-bargaining, which might indicate that the drafters intended to disallow the practice. But paradoxically, the possibility of plea-bargaining lurks in Article 65(5), which provides that the Court shall not be bound by the discussions between the prosecution and the defence regarding the modification of charges, the admission of guilt, or the penalty.\[^{451}\] It has been argued that this provision results from the ‘erroneous notions by some European Lawyers about common law procedure’ and is ‘totally superfluous’.\[^{452}\] While it is true that plea negotiations are formally not binding upon a common-law court either, the novelty of the ICC context and the intrinsic uncertainty about how the practice will develop may justify the inclusion of an express norm.\[^{453}\]

The other ICC Statute provisions confirm that the ICC prosecutor has powers enabling him or her to enter into plea discussions with the accused. For example, Article 54 provides that the prosecutor may make such arrangements and agreements, not inconsistent with the Statute, as may be necessary to facilitate the cooperation of the person.\[^{454}\] Moreover, the prosecutor may amend or withdraw the charges: (i) before the confirmation hearing, with notification to the PTC of the reasons for the withdrawal;\[^{455}\] (ii) after the charges are confirmed and before the trial has begun, with the permission of the PTC and after notice to

\[^{448}\] Guariglia/Hochmayr, ‘Article 65’ (n 430), at 1225 (‘there is a difference between the procedure under this provision and a common-law style guilty plea, … in that an admission of guilt under this provision is not binding on the Court and does not allow the Trial Chamber to move automatically to the sentencing stage’).

\[^{449}\] E.g. Transcript, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-T-107-ENG, TC I, 26 January 2009, at 3 lines 6-7 (defence counsel entering a plea of not guilty on the client’s behalf); Transcript, Prosecutor v. Katanga and Ngudjolo, Situation in the DRC, ICC-01/04-01/07-T-52-ENG, TC II, ICC, 27 November 2008, at 24-31; Transcript, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-T-32-ENG, TC III, ICC, 22 November 2010, at 6-9 (counsel entering a plea of not guilty to all charges); Transcript, Prosecutor v. Ruto and Sang, ICC-01/09-01/11-T-27-ENG, TC V(a), ICC, 10 September 2013, at 12-4 (both accused pleading not guilty to all charges).

\[^{450}\] Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 195), at 611 (‘At the national level, there exists a broad range of techniques to reduce the relevance of the trial, mostly designed to reduce the overall length of the proceedings. It should be emphasized that the ICC does not incorporate many of these techniques. The Statute does allow simplified proceedings when the accused has admitted guilt, but even here, it is important to note that the regime under Article 65 is strikingly different from the technique of plea-bargaining.’).

\[^{451}\] Behrens, ‘The Trial Proceedings’ (n 432), at 242, who notes that Art. 65(5) emerged from the August 1997 PrepComm session at which France agreed to the provision on guilty pleas provided that the effects of bargaining would be stipulated; it reflects the consensus that the discussions between the parties are beneficial for ensuring expeditious and focused trials, but that the ICC should not be bound by such discussions.


\[^{454}\] Art. 54(3)(d) ICC Statute.

\[^{455}\] Art. 61(4) ICC Statute.
the accused, and (iii) after the commencement of the trial, with the permission of the Trial Chamber. The need to obtain a judicial permission for the withdrawal of the charges, combined with the Trial Chamber’s *ex officio* truth-finding duty, may place additional fetters on the plea negotiations between the parties before the ICC. Article 65(5) is hardly conducive to increasing the number of the admissions of guilt by the ICC accused. From the outset, it provides them with no incentives to enter into negotiations with the prosecution who in turn is deprived of a strong negotiating position, being incapable of making promises that would be binding on the Trial Chamber. However, only the actual practice of the Court as complying with, or deviating from, the sentences recommended by the prosecution will show what impact Article 65 may have on the normative significance of the full contested trials at the ICC. As noted, the practice thus far gives a preliminary indication that its effects might be marginal and do not result in systemic trial-avoidance.

Finally, Rule 69 introduces the possibility for the parties to enter into agreements on facts. It is a trial-management tool that allows evidence on uncontested facts not to be presented at trial and thus distinct from agreements mentioned in Article 65(5) regarding charges, admission of guilty, or penalty. The Rule stipulates that the parties may agree that an alleged fact in the charges, document, or forthcoming testimony is not contested and the Chamber may consider it as being proven, unless it is of the opinion ‘that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims’. This device can help shorten trial proceedings by avoiding the presentation of evidence to establish facts on which the parties agree. But its purport and ambit are not such as it could supplant or undermine the regular trial process as the main fact-finding engine: the Trial Chamber is not bound by such agreements and holds a broad discretion to opt for a fuller presentation of evidence.

### 4.4 SPSC

The consensual justice in the SPSC context was modeled on the blueprint of Article 65 of the ICC Statute. Section 29(2)(d) TRCP provided that among other steps to be taken at the preliminary hearing (such as ensuring that the accused is familiar with the indictment and understands the charges and that his or her rights have been respected), the judges were to provide the accused with an opportunity to make a statement concerning the charges. The form of such a statement as envisaged in the TRCP was similar to the admission of guilty before the ICC, in that it could result either in a plea of not guilty or in an admission of guilt regarding all or some of the charges. The proceedings on an admission of guilt are ruled by Section 29A, reproducing Article 65 of the ICC Statute almost verbatim.

When faced with an admission of guilt—which could be made at any time before the final decision in the case—the investigating judge or the judges of the special panel had first to determine its validity in light of requirements similar to those set forth in Article 65(1) of the ICC Statute. Upon review of the admission, the panel would be presented with three options. First, where it was satisfied that the admission met the requirements, it might consider it, together with any additional evidence presented, as ‘establishing all the essential

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456 Art. 61(9) ICC Statute. The same Article provides that if the Prosecution seeks to include additional charges or to substitute more serious charges, an additional confirmation hearing on these new charges must be held.

457 Art. 61(9) ICC Statute.

458 See also Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1390-1 (indicating this as the ‘reason why charge bargaining is less likely to occur at the ICC’).

459 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 36), at 1481; Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1390 (‘Article 65(5) reduces the attractiveness of agreements between the parties.’).

460 Section 29(2)(d) TRCP.

461 Section 29A(1) TRCP.
facts that are required to prove the crime’, and was authorized to convict the accused. Secondly, where the court was not so satisfied, the admission was to be considered as not having been made, in which case the trial was to continue under the ordinary trial procedure. The same outcome would ensue where the court considered that ‘a more complete presentation of the facts of the case is required in the interests of justice, taking into account the interests of the victims’. No provision was made for such cases to be remitted to another trial panel, which might mean that a valid admission could not effectively be retracted and might have effects similar to the admission of facts. Thirdly, the latter conclusion might lead the court to request the prosecutor to present additional evidence, including the witness testimony. If the panel were to find that any admission was contained in a statement or confession made by the accused before the investigating judge and that it had been made in conformity with Section 29A, it might be admitted into evidence rather than be considered as an admission proper.

In practice, the SPSC in the Dili District Court often disposed of cases via Section 29A(2) of the TRCP. This is unsurprising: the budgetary constraints set on the Serious Crimes process could not but make the vehicle of admission of guilt highly appealing. As reported by the Judicial System Monitoring Programme, out of ninety-four persons convicted by the Special Panels from the commencement of their operations in 2000 until their closure in May 2005, twenty-one accused ‘pleaded guilty’. In fact, it may well be that the number of the accused who admitted guilt was even higher (twenty-five). Ascertaining that may be difficult due to the unavailability of publicly available complete authentic case records, which may in part explain contradictory figures provided by different researchers. This gives an admission-of-guilt rate of over 25.7%, which is unprecedented, if one compares it with the respective rates at the ad hoc tribunals, let alone the ICC to date. Whether this rate is to be deemed a positive record requires the understanding of the problematic context in which the admissions of guilt were entered and accepted.

As a matter of fact, the prevailing number of accused before the SPSC admitted their guilt at the very early stages of pre-trial proceedings, which resulted in the swift disposition of cases. In most cases, however, the admissions were qualified by references to the defence

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462 Section 29A(2) TRCP. See Art. 65(2) ICC Statute.
463 Section 29A(3) TRCP. See Art. 65(3) ICC Statute.
464 Section 29A(4)(b) TRCP. See Art. 65(4)(b) ICC Statute.
465 Section 29A(4)(a) TRCP. See Art. 65(4)(a) ICC Statute.
466 Section 33.4 TRCP.
468 According to this author’s own calculations on the basis of the publicly available decisions, no less than 25 accused admitted guilt in the SPSC proceedings, including the following (in the chronological order): João Fernandes (10 January 2001); Marcurious de Deus (11 March 2002); Augusto dos Santos (19 March 2002); João Franca da Silva (21 October 2002); ‘X’ (25 October 2002); Sabino Gouveia Leite (11 November 2002); Agustinho Atolan (22 May 2003); Benjamin Sarmento and Romeiro Tilman (30 June 2003); João Sarmento (4 August 2003); Anastacio Martins (1 September 2003); Miguel da Silva (17 November 2003); Joaico Gusmão (27 January 2004); Lino de Carvalho (16 February 2004); Abilio Mendez Correia (3 March 2004); Beny Ludji and ‘Another’ (3 May 2004); Agostinho Cloe, Agostinho Cab, Lazarus Fuli, Antonio Lelan, Domingos Metan, Lino Beno (27 October 2004); Anton Lelan Sufa (8 November 2004); and Francisco Pedro (31 March 2005).
469 Some researchers claimed that about 50% of all cases processed by the SPSC were disposed of through admissions of guilt, but this does not appear accurate, being based on anecdotal evidence: e.g. Combs, *Guilty Pleas* (n 329), at 117 (supporting the statement regarding 50% rate of ‘guilty pleas’ by reference to the telephone interview with a prosecution staff member and defence counsel); Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1393. The data provided by others are a closer call: A. Smeulers *et al.*, ‘Sixty-five Years of International Criminal Justice: Facts and Figures’, (2013) 13 *International Criminal Law Review* 7, at 18 (indicating that 27 out of 88 defendants entered ‘guilty pleas’, resulting in the rate of 31%).
470 See *supra* 4.2 and 4.3. This percentage is counted in relation not to 94 convicts, but 97 individuals with respect to whom the SPSC issued a judgment (either conviction or acquittal).
471 Combs, *Guilty Pleas* (n 329), at 115.
of duress and did not appear informed, voluntary, or such as had been made after sufficient consultation with counsel.\textsuperscript{472} In such circumstances, the correct interpretation and stringent application of the legal test of Section 29A were crucial for the fair administration of justice.\textsuperscript{473} However, often the SPSC failed to duly apply those requirements. The panels did not always satisfy themselves that the accused had gained an adequate understanding of the legal consequences of the admission and could distinguish between duress being a defence and superior orders as a mitigating circumstance.\textsuperscript{474} It appears that such confusion was not uncommon.\textsuperscript{475} The later jurisprudence shows some improvement in the way the panels verified the validity of the admissions of guilt.\textsuperscript{476} But the malaise was never definitively cured. For example, as late as in 2003, the Sarmento and Tilman panel further effectively ignored a statement that should have been interpreted as putting forth a defence of duress and investigated.\textsuperscript{477}

The first SPSC case of João Fernandes, who admitted to be guilty of murder under superior orders and was convicted and sentenced to 12 years’ imprisonment, can be deemed paradigmatic.\textsuperscript{478} Following an appeal that sought an acquittal on the ground that the panel had failed to appreciate superior orders as a circumstance undermining the required mens rea of the crime, the Court of Appeal upheld the conviction because, in its view, it was based on a valid admission of guilt which fulfilled the standards of Section 29A.1, including the requirement that the admission be informed.\textsuperscript{479} In his dissent, Judge Egonda-Ntende held—with good reasons indeed—that the panel had not taken sufficient measures to ensure that the


\textsuperscript{473} JSMP Digest (n 467), at 13.

\textsuperscript{474} Sections 19.1(d) and 21 UNTAET Regulation 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000.

\textsuperscript{475} JSMP Digest (n 467), at 42. JSMP also criticizes the SPSC’s handling of the admissions of guilt in the judgments for paucity and superficiality. See ibid., referring to Judgement, Prosecutor v. Agostinho Cloe et al., Case No. 4/2003, Dili District Court, SPSC, 16 November 2004, at 9; Judgement, Prosecutor v. João Franca da Silva, Case No. 4a/2001, Dili District Court, SPSC, 5 December 2002, paras 43-4.

\textsuperscript{476} See e.g. Judgement, Prosecutor v. Lino de Carvalho, Case No. 10/2001, Dili District Court, SPSC, 18 May 2004, paras 26-8 and Judgement, Prosecutor v. Abilio Mendes Correia, Case No. 19/2001, Dili District Court, SPSC, 9 March 2004, paras. 24-6 (the panel advised the accused about his rights and the consequences of admitting guilt and verified that the preconditions of Section 29A.1 TRCP had been met by inquiring with the accused as to different aspects of his understanding of the legal meaning of the admission).

\textsuperscript{477} See e.g. Combs, Guilty Pleas (n 329), at 117-8 (referring to the Sarmento and Tilman transcripts case which reflect that while Sarmento mentioned an order he received to commit the crime, Tilman actually used the language that might well amount to a defence of duress (‘The commander of militia forced me. I was scared to death.’) After Tilman consulted his lawyer and confirmed that he was guilty, the admission of guilt was accepted).


\textsuperscript{479} Judgement, Prosecutor v. João Fernandes, Case No. 2001/02, Court of Appeal, SPSC, 29 June 2001 (‘João Fernandes appeal judgement’), at 4-6. The reasoning of the Court of Appeal in the João Fernandes appeal judgement contains a contradiction. The Court explicitly recognized that the accused’s understanding ‘that the confession of guilt referred by the [sic] Section 29A leads only to a confession of the facts present on the accusation, which will be later juridically qualified by the court, which even can decide for the acquittal of the accused of the crime referred by the confession … won’t be the best one.’ This should have led the Court of Appeal to the conclusion that the accused had misunderstood the nature and legal consequences of the admission and that, therefore, the admission had not met the standard of Section 29A.1(a) TRCP. The reversal of the trial judgment and remittal of the case to the trial instance should have ensued.
requirements of Section 29A.1 had been met and that the accused had actually understood the legal consequences of his admission.\footnote{Judgement of Egonda-Ntende, J.A., \textit{João Fernandes} appeal judgement (n 479), at 20-1. The problem was exacerbated by the lack of adequate interpretation facilities, which could have led to misunderstanding between the panel and the accused at the time of the admission of guilt: Linton and Reiger, ‘The Evolving Jurisprudence and Practice of East Timor’s Special Panels’ (n 472), at 15.}

The \textit{João Fernandes} majority judgment shed light on the nature of admission of guilt and its legal effects for the first time. According to the panel, the concept bore more resemblance with the common-law guilty plea. The panel regarded an admission of guilt under Section 29A as the legal admission of guilt, as opposed to a confession subject to further scrutiny by the court, which meant that it should be unequivocal.\footnote{\textit{João Fernandes} appeal judgement (n 480), at 4 (‘The confession consecrated in the Section 29A is a confession of guilt of a crime and not only a confession of facts, which can later be qualified by the court. Through it, the accused accepts that he had committed the crime charged by the accusation, without any reservation.’).} The \textit{Fernandes} judgment thus established the absence of any reservation, or non-equivocation, as the parameter of validity of admissions of guilt and carved the way for the routine use of this criterion as if it were implied in Section 29A.1.\footnote{\textit{João Fernandes} appeal judgement (n 480), at 6 (‘Verified the regularity of the confession of guilt, it’s no longer needed to produce evidence on the trial’s hearing about the facts that are part of the charged crime. The trial goes immediately to the final allegation stage, foreseen in the Section 38.’).}

Likewise, the Court of Appeal held that the consequence of a valid admission of guilt was that the further examination of evidence was unnecessary.\footnote{E.g. \textit{João Fernandes} trial judgement, \textit{supra} note 478, paras. 6-7; Judgement, \textit{Prosecutor v. Carlos Soares}, Case No. 12/2000, Dili District Court, SPSC, 31 May 2001 (‘\textit{Carlos Soares} trial judgment’), at 2; \textit{Sarmento and Tilman} trial judgement, \textit{supra} note 482, paras 25-26; Judgement, \textit{Prosecutor v. Anastacio Martins and Domingos Gonçalves}, Case No. 11/2001, Dili District Court, SPSC, 13 July 2003 (‘\textit{Martins and Gonçalves} trial judgment’), at 2 et passim; Combs, \textit{Guilty Pleas} (n 329), at 115 \textit{et seq}.} It did not point, however, to the need to consider in each case whether a more complete presentation of facts might be required, as provided for in Section 29A.4. The Court of Appeal thereby ignored the difference between an admission of guilt and a guilty plea, namely the admission may presuppose or require a further factual inquiry. In further practice, this ‘inquisitorial’ avenue comprised within the concept of the admission of guilt had not been travelled and admissions were tackled as ordinary guilty pleas. It is telling that many SPSC judgments and commentaries on the SPSC jurisprudence consistent use the term ‘guilty plea’ instead of ‘admission of guilt’.\footnote{Combs, \textit{Guilty Pleas} (n 329), at 116; Linton and Reiger, ‘The Evolving Jurisprudence and Practice of East Timor’s Special Panels’ (n 472), at 13 and n66. See e.g. Judgement, \textit{Prosecutor v. Joseph Leki}, Case No. 05/2000, District Dili Court, SPSC, 11 June 2001, at 2, 6-9; Judgement, \textit{Prosecutor v. Gaspar Leite}, Case No. 05/2001, Dili District Court, SPSC, 14 September 2002, paras 12 and 55; Judgement, \textit{Prosecutor v. Julio Fernandes}, Case No. 02 C.G.2000, Dili District Court, SPSC, 27 February 2001, para. 3; Judgement, \textit{Prosecutor v. Manuel Leto Bere}, Case No. 10/2000, Dili District Court, SPSC, 15 May 2001, at 3; Judgement, \textit{Prosecutor v. Jose Valente}, Case No. 03/2001, Dili District Court, SPSC, 19 June 2001, at 2; Judgement, \textit{Prosecutor v. Joni Marques et al.}, Case No. 09/2000, District Dili Court, SPSC, 11 December 2001 (‘\textit{Los Palos} trial judgment’), para. 13; Judgement, \textit{Prosecutor v. Carlos Soares Carmona}, Case No. 03 C.G. 2000, Dili District Court, SPSC, 19 April 2001, at 2; \textit{Carlos Soares} trial judgment (n 484), at 2.}

Subsequently and up to March 2002, the SPSC operated with greater caution, turning down a number of admissions of guilt because of connected claims of duress or superior orders, incongruence or partial disagreement with the charges, apparent lack of consultation with legal representatives or factual inconsistency.\footnote{Likewise, the Court of Appeal held that the admission of guilt in the Case of \textit{Prosecutor v. Carlos Soares Carmona} can be a merely partial admission of responsibility, which can later be qualified by the court.\textit{Prosecutor v. Carlos Soares Carmona} (n 485), paras 25-26; Judgement, \textit{Prosecutor v. ‘X’}, Case No.04/2002, Dili District Court, SPSC, 2 December 2002, para. 20.}
Chapter 6: Centrality of Trial

characterizing the statements by the accused as claims of duress or superior orders led them to opt for the ‘better safe than sorry’ approach. Admissions were rejected and cases disposed of through full trials pursuant to Section 29A.3. Most of these trials involved ordinary crime charges against single accused, were uncomplicated, and did not divert much of the court’s resources. However, the changes in the Serious Crimes Unit’s charging policy aimed at indicting crimes against humanity as opposed to putting forth ordinary murder charges as well as the improved quality of the defence tended to prolong the complexity and duration of SPSC trials. Furthermore, the growing involvement by competent and experienced defence counsel from late 2002 onwards, meant that defendants were more often advised against admitting guilt without expecting lenience in return.

In turn, this increased pressure on the system to take measures for expediting the docket – the pressure which had already been significant in view of severe budgetary shortage haunting the Serious Crimes process in East Timor from its inception in late 1999. This transformed into incentives for the parties to turn again to the appealing solution of consensual case-disposition and prepared soil for discussions over charges and sentences between the parties. The first several admissions before the SPSC—whether accepted or rejected—had been spontaneous. But the factors just mentioned eventually compelled the prosecution to actively seek for bargains with the accused. The negotiated settlements soon developed into an essential aspect of the SPSC practice: the parties negotiated their agreements on admissions and presented them in writing in open court.

Similarly to the ICC Statute, TRCP made no provision on the plea-bargaining procedure, besides a stipulation in Section 29A.5 to the effect that no discussions between the prosecutor and the defence regarding the modification of charges, the admission of guilt, or the penalty are binding on the court. In fact, the panels came both to encourage admissions of guilt and to endorse the bargaining practice by handing down significantly lower sentences where the accused had admitted guilt. They routinely followed the prosecution’s sentencing recommendations, and the sentencing discounts at times reached 50 per cent of the sentence. According to Combs, in none of the SPSC cases in which defendant admitted guilt did the panels impose a sentence longer than recommended.

Charge bargaining must have been taking place as well but because the prosecution did not include promises to withdraw charges in the agreements of the admissions, it appears that the charges were withdrawn less explicitly – for the lack of evidence or because the conduct was covered by another charge. Regardless of any inconsistencies in the quanta of

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486 Approvingly of this caution, see Combs, Guilty Pleas (n 329), at 116; Linton and Reiger, ‘The Evolving Jurisprudence and Practice of East Timor’s Special Panels’ (n 472), at 13-14. For example, in the multi-accused Los Palos case, the admission of guilt by Joni Marques was accepted only at the end of trial, after hearing witnesses and submissions by the parties, even though he had admitted guilt on some charges as early as on 10 July 2001. See Los Palos trial judgment (n 485), para. 13.
487 Combs, Guilty Pleas (n 329), at 116 and n700, noting that many of the first trials (e.g. Julio Fernandes, Carmona, Beri, Joseph Leki) consumed only from one to three sessions. However, the Los Palos trial on the crimes against humanity charges involved 10 defendants and took 4 months (July-November 2001): Los Palos trial judgment (n 485), para. 13.
488 Combs, Guilty Pleas (n 329), at 117.
489 Ibid., at 119. Based on the interviews with the prosecution staff, Combs reports that the following defendants in the first SPSC cases made spontaneous confessions: João Fernandes, Julio Fernandes, Joni Marques, Marcurious José de Deus, and Augusto Dos Santos.
490 Ibid.
491 E.g. Judgement, Prosecutor v. Agustinho Atolan, Case No. 3/2003, Dili District Court, SPSC, 9 June 2003, at 6 and 9 (handing down the sentence of 7 years’ imprisonment as recommended by the parties); Martins and Gonçalves trial judgment (n 484), at 18 (with reference to the ‘procedural shortcut elicited by the defendant who pled guilty’, the panel sentenced Martins to 11.5 years’ imprisonment as opposed the sentence of 23 years’ imprisonment he would have otherwise received).
492 Combs, Guilty Pleas (n 329), at 119-21.
493 Ibid., at 121.
sentencing discounts accorded by the panels to the accused who had admitted guilt, deference by the panels towards the agreements provided the accused with strong incentives not to contest charges and to cooperate with the prosecution. This circumstance should be viewed in combination with other unique factors not common to high-profile ICTY and ICTR defendants – illiteracy, extreme poverty and unprivileged social status, low rank and subordinate position at the time of the offences, and the absence of political motives. These factors were conducive to the pervasion of admissions of guilt in the SPSC and account for the rate of non-contested trials by far exceeding that in any other tribunal.

Even so, the practice of consensual justice in the SPSC did not substantially reduce the value of contested trial as the principal modality of case-disposition. As noted above with respect to the ICC, as a matter of law, admissions of guilt are neither inconsistent with, nor rule out the continuation of trial proceedings, even if in some abbreviated form, because the court is not duty-bound to bypass trial upon receiving and validating an admission. The predominant interpretation of admissions by the SPSC along the lines resembling traditional guilty pleas, rather than confessions, has somewhat diminished the nominally weak effects of admissions on the trial process but it certainly did not undermine the prevalence of trials by turning them into a minority practice. In over seventy per cent of SPSC cases, judgments still resulted from full contested trial proceedings, which is incomparable with the status in some national jurisdictions where recourse to negotiated dispositions is statistically considerably higher.

4.5 ECCC

The ECCC IR do not envisage guilty pleas or admissions of guilt but reflect a pure civil-law approach. An acknowledgement of facts and responsibility by the charged person in the course of an interview given to the CIJ pursuant to Rule 58 is viewed as a confession, i.e. a piece of evidence that is to be placed on the dossier as any other item of proof and to be evaluated by the Trial Chamber.494 Rule 89bis concerning the initial hearing is silent on a procedure for the formal invitation to the accused to admit guilt (plead guilty) or otherwise, although this is ordinarily when the charges listed in the closing order made by the CIJ—possibly confirmed or modified by the PTC—shall be read out by the Greffiers.495 The absence of a procedural step reserved for pleas or admissions is explained by the ‘inquisitorial’ nature of the ECCC process. Any statements on facts will have been made in the judicial investigation phase and would be known to the trial judges from the dossier. At an early stage of trial, the accused has several possibilities to provide additional clarifications or to admit facts – for example, in a response to the OCP’s opening statement or during judicial questioning that takes place soon thereafter.496

As discussed earlier, some of the modernized continental systems allow for simplified proceedings where the accused does not contest charges in limited categories of cases.497 In contrast to these developments, the ECCC Rules do not incorporate institutes of consensual justice and do not provide for an abridged or summary trial following the admission of facts or confession. This reflects the status obtaining in Cambodian criminal procedure, as opposed to European jurisdictions, including France.498 An element of the ECCC procedure which comes closest to consensual justice in terms of the possible effect of abbreviating trial process is ECCC Rule 87(6) which provides that “[w]here the Co-Prosecutors and the Accused agree

494 Rule 87(3) ECCC IR (‘The Chamber shall give the same consideration to confessions as to other forms of evidence.’).
495 Rule 89bis(1) ECCC IR.
496 Rules 89bis(2) and 90(1) ECCC IR.
497 See Chapter 4.
498 Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1394 (observing this with regard to Cambodia’s 2007 Code of Criminal Procedure).
that alleged facts contained in the Indictment are not contested, the Chamber may consider such facts as proven.”

Thus, Rule 87(6) permits the court to sidestep the hearing of the evidence on incriminating facts not contested by the defendant. But it does not foreclose a further inquiry by the Chamber, which is not bound by the agreement. On the contrary, where it deems the hearing of evidence necessary to ascertain the truth, the Chamber shall pursue the inquiry on undisputed matters beyond ‘agreed facts’. Thus, confessionary statements and admissions per se have no automatic and drastic impact on the format and length of the trial hearing. Given the absence from the Internal Rules of provisions concerning the permissibility of negotiated justice, the question begs itself as to what factors might influence the incidence of agreements on facts. As noted, the ECCC is an ‘inquisitorial’ regime entrusting investigation to impartial judicial authorities vested with the power to question charged persons. Subject to the right to remain silent and other fair trial guarantees, the system is based on a tacit expectation that the person would cooperate with the CIJs in their investigations and may present those persons with covert incentives to confess incriminating facts or not to contest charges.

Whenever the charged person (or accused) confesses or admits facts and regardless of whether the Chamber holds these facts ‘proven’ in accordance with Rule 87(6), the trial hearing will be streamlined. This is because no or not as many (additional) witnesses will need to be called to prove the respective allegations. The ECCC’s experience in its first case has to some extent justified this expectation. As noted earlier, Kaing Guek Eav—first as the charged person and subsequently as the accused—confessed numerous facts alleged against him and accepted responsibility for them during the questioning by the OCIJ and by the trial participants. However, unlike what one could have expected, by no standards was the Duch trial exceptionally short. Despite the significant number of agreed facts, the substantive hearing lasted for almost eight months and took seventy-two days of hearing of evidence, including nine expert witnesses, seventeen fact witnesses, and seven character witnesses.”

As the Trial Chamber explained, it ‘was compelled to hear and evaluate all evidence put before it, including in relation to matters not in dispute’ because ‘the agreement on facts neither binds the Chamber nor relieves the Co-Prosecutors of their burden of proof’. By way of comparison, the accused in Case 002 chose not to confess incriminating facts during the judicial investigations. Moreover, they consistently maintained this position throughout trial, which meant that the trial in the more voluminous and complex Case 002 was bound to be by far lengthier than the Case 001 trial.

499 Rule 87(6) ECCC IR (Rev. 4, 11 September 2009).
500 Supra n 293. See also Judgement, Kaing Guek Eav, Case File No. 002/14-08-2006, TC, ECCC, 26 July 2010 (‘Duch trial judgment’), para. 47 (‘Broadly speaking, the Accused agreed with or did not dispute a significant number of facts contained in the Amended Closing Order’) and Annex I: Procedural History, ibid., para. 18 (the defence ‘either agreed with or did not dispute 238 of the 351 proposed facts alleged in the Amended Closing Order’). For Duch statements or responses at trial admitting facts or responsibility for them, see e.g. Transcript of Proceedings – ‘Duch’ Trial (Trial Day 2), Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 31 March 2009, at 67; Transcript of Proceedings (Trial Day 4), 6 April 2009, at 22 and 24; Transcript of Proceedings (Trial Day 5), 7 April 2009, at 38.
501 The substantive hearing in the Duch trial commenced on 30 March 2009 and was concluded with closing statements delivered on 23-27 November 2009. See Annex I: Procedural History, Duch trial judgment (n 500), para. 19.
502 Duch trial judgment (n 500), paras 48 and 49.
503 Nuon Chea denied all charges and exercised his right to remain silent, while Ieng Sary and Khieu Samphan denied numerous essential and incriminating alleged facts: see e.g. Nuon Chea et al. closing order (n 292), paras 50, 873, 967, 973, 1047, 1111, 1141, 1583, etc.
504 Due to the scope of the charges, expected volume of evidence, and the senior age of the accused, Case 002 was severed into several mini-trials, the first of which (Case 002/01) commenced on 21 November 2011 and has not been concluded as of September 2013. In the meantime, the proceedings against Ieng Sary were terminated on 14 March 2013 due to his death while Ieng Thirth was found to be unfit to stand trial in November 2011 due to progressive dementia.
This confirms that in the ECCC legal regime the nominal effects of admissions made by the accused on the relevance of trial as the truth-finding locus are weak by definition. Since confessions are statements of facts and not legal declarations, they do not lift the obligation of the court to establish the truth and to evaluate the evidence. Hence, even extensive co-operation by the accused will not necessarily significantly expedite the process and much less lead to trial-avoidance. In terms of actual impact, the practice so far suggests that non-contestation by the accused does streamline the substantive hearing to some extent, inasmuch as the admissions of facts will narrow the contested matters down, diminish the number of witnesses that need to be heard, and enable the Chamber to better plan and organize the trial process. But it does not make trial anywhere close to dispensable events. The resource savings to be obtained at the ECCC from the consensual mode of proceeding are not comparable to those in *pro forma* and summary ‘trials’ following negotiated settlements in some domestic inquisitorial systems. The ECCC Trial Chamber is still expected to hold an extensive oral and public trial at which all evidence will be heard and the truth of facts probed in earnest, whether or not the accused denies facts.

4.6 STL

The discussion of consensual dispositions in the STL is bound to be limited to a tentative assessment of their nominal or potential effects on the trial process, not least because there has been no practice up to date. The STL Statute envisages the institute of pleas as the part of its procedural regime. Drawing upon the language of Article 20(3) of the ICTY Statute and Article 19(3) of the ICTR Statute, Article 20(1) of the STL Statute provides that the accused is to enter a plea at the commencement of trial, after the Trial Chamber has read the indictment and has satisfied itself that the rights of the accused are respected and that he or she understands the indictment. The STL Statute omits a controversial requirement that the court shall set a date for trial upon instruction to enter a plea.

The STL Rules on guilty pleas and plea agreements are similar to those of the ICTY. In accordance with Rule 100 of the STL RPE, if an accused pleads guilty in accordance with Rule 98, or requests to change his plea to guilty, the Trial Chamber must satisfy itself of a voluntary, informed, unequivocal, and factually corroborated character of the plea. In that case it may enter a finding of guilt and set a date for the sentencing hearing. The important difference is that the amended Rule 100 provides for an additional safeguard to ensure the validity of guilty pleas entered in accordance with a plea agreement. It establishes the Chamber’s prerogative and duty to satisfy itself of the defendant’s understanding of the agreement and appreciation of its consequences before a finding of guilt can be entered.

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505 See e.g. Duch trial judgment (n 500), para. 49 (‘Where material from the agreement on facts was put before the Chamber and subjected to examination, the Chamber remained free to assess what weight, if any, to give it.’).
506 *Ibid.*, para. 48 (‘The agreement on facts nevertheless significantly assisted the Chamber in identifying the most contentious issues at trial and in streamlining the proceedings.’). See also Transcript of Proceedings – “Duch” Trial (Initial Hearing, Day 1), Case File No. 001/18-07-2007-ECCC/TC, TC, ECCC, 17 February 2009, at 15 (‘Any such agreement will have the sole purpose to allow the Trial Chamber to organize and prepare to appraise the facts and the evidence relating to the case.’).
507 See n 337.
508 Rules 99 and 100 STL RPE. Cf. Rules 62bis and 62ter ICTY RPE.
509 Rule 171(A) STL RPE envisages holding, in case of finding of guilt, hearing at which the prosecutor and the defence ‘may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence’.
510 Rule 100(B) STL RPE (Rev. 3, 25 November 2010) (‘If an accused enters a plea of guilty pursuant to a plea agreement under Rule 99, the Trial Chamber shall, prior to entry of a finding of guilt, satisfy itself that the accused: (i) understands the terms of the plea agreement; (ii) has discussed the terms of the plea agreement with
Similarly to the ICTY, the possible implications of a valid guilty plea at the STL for the further course of trial proceedings are substantial as the trial can be dispensed with altogether. It remains to be seen how these provisions will be interpreted and what actual impact they would have on the relevance and functionality of the trial phase, if at all. At present, the wide resort of guilty pleas and bargaining at the STL may seem unlikely. Due to its tailored jurisdiction and proven difficulties with arresting suspects, the STL’s docket will hardly ever be in excess of its trial capacity. This might provide parties with insufficient incentives to seek bargains. Secondly, like the ICC, the STL regime allows for the participation of victims in the proceedings. Although Rule 100 follows the ICTY model and provides no possibility for the victims to directly influence the outcome of the assessment of the validity of a guilty plea, such considerations may enter through the backdoor of Rule 100(A)(iv) (regarding ‘sufficient basis’) or possible discretion of the Chamber to reject a formally admissible plea ‘in the interests of justice, in particular the interests of the victims’. For example, such concerns would affect the determination of whether the Chamber may consider facts not contested by the parties as ‘proven’ without ‘a more complete presentation of the alleged facts’ under STL Rule 122 (which is identical with ICC Rule 69).\(^{511}\) One could argue by analogy that where the presentation of the totality of evidence, and not only of that relating to agreed facts is at stake, the Chamber \textit{a fortiori} has no other option that to give full consideration to the ‘interests of victims’. To the extent that this analogy is plausible, the more victim-inclusive character of the STL process might entail weaker nominal effects of guilty pleas in its context and reduce the attractiveness of bargaining for the parties.

5. CONCLUSION: INTERNATIONAL TRIAL UNDER ATTACK?

The purpose of this Chapter has been to appraise the normative relevance and functional autonomy of the trial across historical and modern international and hybrid criminal tribunals. The evolution of their procedural frameworks and practice has been tracked in respect of the two major themes which come to bear upon the importance of international criminal trials as judicial venues for ascertaining the truth and for making decisions on the criminal responsibility of the defendant. These themes are, first, the ever-expanding judicial role and function in the pre-trial phase of the proceedings and, secondly, resort to consensual disposition through negotiated justice practices. This focus is explained by the analogy drawn with the domestic context where the same factors are deemed to pose a normative threat to the phenomenon of criminal trial. Admittedly, this is a compelled and limited selection, since other factors also have an impact on the epistemological and normative importance of the trial process (for example, the appeal stage and the availability and function of case file).

With this caveat in mind, the Chapter has argued that in the process of historical evolution of international criminal procedure and in the course of procedural reforms in specific international criminal tribunals, the predominance of the trial in their procedural regimes has remained unscathed. In all jurisdictions surveyed, the trial phase is the central stage of the proceedings, being an epistemological and expressive culmination of the entire international criminal process. The presence in the tribunals’ regimes of elements which might diminish the importance of the trial phase proved to have had no such implications. The following summarizes the comparative observations for this conclusion and reflects on the normative reasons for the continued prevalence of trial among other stages in international criminal proceedings.

\(^{511}\) See \textit{supra} 4.3.
The comparative and chronological overview of the regulation of pre-trial judicial process from the historical IMTs to the contemporary forms of (hybrid) criminal justice confirms that the major trends in this domain have been the increasing sophistication and functionalities of the pre-trial stage and the expansion of the judicial role and involvement in the preparation of the trial. While at Nuremberg and Tokyo judges played virtually no role in the investigation, confirmation of the charges, and case-management in advance of the trial, this approach became a historical artifact already in the second-generation tribunals. Next to their statutory function in confirming the indictments, the *ad hoc* tribunal judges were increasingly expected to ‘roll up their sleeves’ and ‘descend into the arena’ by undertaking early measures towards expeditious trial proceedings. The specially appointed pre-trial (or designated) judge at the ICTY, ICTR, and SCSL was tasked with the tasks of facilitating the parties’ communication prior to trial, identifying matters in dispute, catalyzing the preparation for trial, facilitating disclosure, and removing any obstacles to the commencement of trial. Subject to nuances in the three courts, trial chambers were granted powers to moderate the volume and time-frame of the case. The measures have included the reduction of the number of witnesses to be called, the setting of time-limits for the presentation of evidence and examination-in-chief of witnesses, and—in respect of the prosecution case—by inviting the prosecutor to reduce the number of counts charged and by fixing crime sites and incidents encompassed within the counts (ICTY and SCSL) or even by ordering her to select counts on which evidence is to be presented. Insofar as these powers restrict the parties’ autonomy in bringing their case to the court and demand that judges have prior knowledge about the general lines of that case in advance of the trial, they have proved controversial from the traditional adversarial perspective. Nevertheless, the judges’ transformation from detached umpires in an adversarial process into proactive case-managers was not attended by extending them any role in the investigations or by enabling them to review the parties’ evidence in much detail. Hence, the managerial judging reforms were not aimed at, and did not result in, shifting the fact-finding inquiry from the trial phase to the earlier stage of the proceedings. Prior to the (prosecution and defence) evidentiary stages of the trial, the members of the Trial Chamber are not given access to the *evidence* in the case but only to the parties’ general information enabling them to perform their managerial competences. This managerial judging model has been integrated in the regimes of all successor courts from the ICC to STL. The institute as such is neither meant to draw nor is capable of drawing from the proper fact-finding and adjudicative functions of the trial.

In respect of the ICC, the implications of the confirmation of charges procedure call for special attention when it comes to the preservation by the trial of its position as the prime forum of truth-finding and case-resolution on the merits. As the Chapter noted, the risk is that, despite the PTCs’ assurances to the contrary, their practice has in fact rendered the confirmation procedure akin to a ‘mini-trial’, infringing upon the prerogatives of judges at trial and competing in normative significance with it. The specter of the PTC appropriating or duplicating some of the core trial functions is raised in particular where that Chamber accords only nominal deference to the limited purpose of the confirmation hearing. This may occur when it applies the evidentiary standard exceeding that of ‘sufficient evidence to establish substantial grounds to believe’, prefers live testimony to summary or documentary evidence, or conducts an in-depth analysis of evidence such as would amount to a prejudgement of its probative value. The Chapter had dealt with some criticisms along these lines that have been voiced, both from within and outside of the Court, in respect of the confirmation practice. Whether or not one finds merits in those concerns, the special rationale distinguishes the confirmation from the trial as a matter of law, as attested by the applicable standard of proof. It would be an excess of its competence if the PTC evaluated the proof for the end other that of deciding if the accused is to be committed to trial. The balanced approach to evidence at the confirmation stage should preclude the situations in which a confirmation decision would be casting a shadow on the trial court’s prerogatives or weaken the
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presumption of innocence. In any event, the PTC’s analyses of evidence and interpretations of law are not binding on the Trial Chamber – as opposed to ‘facts and circumstances as described in the [confirmed] charges’ delimiting the trial court’s competence. From the judicial economy perspective, PTCs have good reason to keep their reasoning in and length of the confirmation decision to a necessary minimum. It is in extraordinary circumstances only that a confirmation decision could be deemed to truly compromise the authority and impartiality of trial judges – their familiarity with the reasons (even wrongful or superfluous) given for the decision to confirm the charges does not disable them in the independent evaluation of evidence submitted at trial. By carefully distinguishing the competences of the Pre-Trial and Trial Chambers, the framers of the ICC Statute and Rules did clearly not intend that the confirmation decision would make conviction easier or prejudge the verdict. Should the depth in the PTCs’ analyses of the facts and evidence inappropriately step onto the terrain of the trial court, this would clearly be ultra vires the Statute and does not undermine the normative notion that the trial stage and not the confirmation hearing is the principal and only locus of ascertaining facts with a view to deciding on the guilt or innocence of the defendant.

It remains to pull the threads of the foregoing discussion on the second theme raised by the role of trial: the potential and actual impact of consensual disposition and negotiated justice on the prevalence of full contested trials in international criminal procedure. The Chapter’s evolutionary account of the legal regulation and practice of guilty-pleas and admissions of guilt and facts across the jurisdictions surveyed is useful in highlighting the broader socio-legal value of the trial in the context of international criminal procedure. It was argued that the phenomenon of negotiated justice, being an ‘alternative solution’ to having a full trial par excellence, has disturbed neither the normative prevalence of the trial as the centerpiece of international criminal proceedings nor its practice relevance as the mainstream avenue for disposing of cases in international criminal courts and tribunals.

The possibility for the accused to plead guilty to the charges or to admit guilt is envisaged in the legal frameworks of all tribunals from the historical IMTs to the STL, with the exception of the ECCC that have followed in the ‘inquisitorial’ track of treating such admissions rather as confessions. In the lifetime of the ICTY and ICTR, the regulation of consensual justice has grown increasingly formalized from the initial minimalist approach of expecting the accused to enter a plea to spelling out the requirements to be fulfilled by a guilty plea in order to be accepted and setting out the consequences of plea agreements. The ICC and the SPSC inaugurated the hybrid institution of the admission of guilt. It departs from the common-law-inspired guilty-plea model at the ICTY in that it vests discretion in the Trial Chamber to turn down a formally valid admission of guilt or to order a more complete presentation of evidence in the interests of justice, including in the interests of victims. The admission does not prevent a full-fledged trial or a trial abbreviated to the degree mandatory in light of the interests of justice from being ordered; hence, it does not lead automatically to trial-avoidance. At the ECCC, confessions and non-contestation of incriminating facts by the accused do not amount to legal declarations of guilt but are factual statements to be treated by the court as any other evidence. Even though agreements between the parties that facts are uncontested will considerably shorten the trial process, in case the Trial Chamber regards some of them as proven, the Chamber shall still have a duty to ascertain the truth and go through a regular trial process. Accordingly, by their nominal, or de jure effects on the normative significance of trial, the forms of consensual justice adopted by the international tribunals are located on the regressive scale between strong and weak, as follows: guilty-plea model (ICTY, ICTR, SCSL, STL), admission-of-guilt model (ICC and SPSC), and confession (ECCC).

Besides the nominal effects of consensual justice practices on international criminal trials, the Chapter has looked into their de facto effects and inquired into whether the actual resort to the consensual dispositions drove the contested trials into practical irrelevancy at any point or in any specific jurisdiction. The number of guilty pleas accepted at the ICTY halfway
through its mandate was relatively high, reaching its apex in 2002-2004 and was more evenly spread out at the ICTR. But in the overall context of the tribunals’ operations the guilty-plea rate was relatively low, not exceeding the mark of 13% at either of them. The double of that rate of consensual dispositions (about 26%) is found in the East Timor’s SPSC, as a consequence of unique circumstances which attended the work of that catastrophically underfunded hybrid jurisdiction. Furthermore, in line with their nominal effects on the trial process, the numerous confessionary statements made by the first defendant before the ECCC did not dispense with the need to hold a trial, although his cooperation has streamlined the proceedings. Lastly, no guilty pleas (to international crimes) or admission of guilt have to date been entered at the SCSL, ICC, or the STL. The statistical performance of consensual case-disposition clearly does not permit considering it as a majority phenomenon and mainstream mode of processing cases in international and hybrid criminal tribunals. Even the highest rate of admissions of guilt which is a hallmark of the SPSC operation is still a far cry from the proportion of guilty-plea cases in the total number of cases processed in certain common law countries, in particular the US.

The overview and analysis of the conceptual problems associated with the use of negotiated justice in international criminal law provided in section 4 of the Chapter reveal the fundamental causes for the non-proliferation of guilty pleas and admissions of guilt in the tribunals. The same causes underpin the normative viability and indispensability of full contested trials in international criminal law. On the one hand, it must be admitted that in this domain in particular there exist compelling pragmatic reasons for a regular recourse to consensual dispositions and for the encouragement of plea negotiations between the parties. As shown in Chapter 4 in respect of domestic jurisdictions, there is an inextricable link between the volume of evidence and complexity of litigation expected in contended trial proceedings and the systemic need for consensual case-disposition and, therewith, a favourable or complacent attitude within the system towards plea agreements. The more sophisticated and costly the trial proceedings, the stronger the incentive to use devices for bypassing them, although there are other systemic and case-specific variables which inform the propensity for the uncontested mode of proceeding. International criminal trials are notoriously complex and resource-intensive given the peculiar nature of cases and defendants, complexity of substantive law, difficulties in the collecting evidence and witness protection and other similar factors. These circumstances pose powerful incentives for taking a trial-avoidance avenue and could have been expected to make plea-bargaining pervasive and a cornerstone of international criminal justice.

However, with benefit of hindsight about how the ICTY and ICTR practice developed, this prospect has not materialized. The judges contained to espouse strong normative reservations about the desirability and propriety of plea bargaining as a way of increasing the guilty-plea rate in the system. Being rather ambivalent about any qualitative value of the efficiency gains obtained from negotiated outcomes, the judges viewed negotiated outcomes as more than potentially problematic, in light of the forensic functions and broader socio-political goals of international criminal justice. According to them, the public and oral trial proceedings were to remain the true linchpin of the whole exercise of international criminal prosecutions, being an objective in themselves. The Momir Nikolić Chamber made a candid and paradigmatic statement to that effect:

513 A. Petrig, ‘Negotiated Justice’ (n 453), at 26 (in view of complex proceedings and various logistical difficulties, the use of plea bargaining by international courts is unsurprising).
514 M. Nikolić sentencing judgment (n 358), para. 67 (“The Trial Chamber notes that the savings of time and resources due to a guilty plea has often been considered as a valuable and justifiable reason for the promotion of guilty pleas. This Trial Chamber cannot fully endorse this argument.”).
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When convictions result from a guilty plea, certain aims of having criminal proceedings are not fully realised, most notably a public trial. A public trial, with the presentation of testimonial and documentary evidence by both parties, creates a more complete and detailed historical record than a guilty plea, which may only establish the bare factual allegations in an indictment or may be supplemented by a statement of facts and acceptance of responsibility by the accused.  

The importance of full-blown trials in international criminal proceedings is closely related to the ability of the tribunals to discharge the victim-servicing part of their mandate. While ‘at a trial, victims … have an opportunity to have their voices heard as part of the criminal justice process …[i]t is rare that victims will be called as witnesses as part of a plea agreement, though witnesses may be called at the sentencing hearing.’ Indeed, the ad hoc tribunals have in some guilty-plea cases allowed victims to be called to testify at sentencing hearings about the impact of the crimes on them and on their relatives or as character witnesses. But such victim testimonies are indeed rather exceptional and on many occasions are replaced by written statements, which effectively ‘sterilizes’ the proceedings and silences the ‘voices of victims’ in the courtroom. It has been observed in the domestic contexts that the ‘cathartic effect of a contested trial would not have been produced by the short sentencing hearing that follows the acceptance of a plea of guilty.’ It is difficult to say without a prior sociological research whether the experience of ICTY victims participating in sentencing hearings following a guilty plea has been better in terms of providing them with therapeutic effects and closure than their testimonial participation in contested trials; such effects are bound to be individual and to be informed by a wide of unique circumstances relating to the victim and the case. Generally, contested trials tend to be experienced as challenging and sometimes even traumatic events by the survivors who are called to testify, not least due to the probing questioning they are submitted at cross-examination.

Be it as it may, it is certain that guilty-plea proceedings tend to result in a more limited disclosure of facts and circumstances related to the commission of the offence than the full contested trials and thus in a more limited ‘truth’ which is an important concern for all stakeholders involved, including the public and the victims. The tribunals have firmly associated the contested trial process—rather than outcomes brought about and conditioned by plea-negotiations between the parties—with the ‘quality of justice’ requisite for the successful achievement of the tribunals’ penal and socio-political mandates. Being a way of eliciting and probing the more complete evidentiary basis underlying the charges and arriving at the truth and the verdict on the guilt or innocence via judicial fact-finding, public and oral trial proceedings present the benefits that are too significant to be routinely sacrificed in the pursuit of efficient case-disposition. There may exist needs and circumstances of an institutional and temporal nature justifying increased resort to negotiated dispositions. The

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515 M. Nikolić sentencing judgment (n 358), para. 61. See also ibid., para. 63 (‘Most concerning to this Trial Chamber is that as a result of the negotiations entered into by the Prosecutor and defence, the final plea agreement may include provisions such that the Prosecutor withdraws certain charges or certain factual allegations. … In cases where factual allegations are withdrawn, the public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a “bargaining chip” in the negotiation process.’).

516 Turner and Weigend, ‘Negotiated Justice’ (n 329), at 1394 (‘A full public trial on the merits was regarded as particularly important to acknowledge the victims’ suffering and to ensure the completeness and accuracy of the record.’).

517 See e.g. M. Nikolić sentencing judgment (n 358), para. 62.

518 See e.g. D. Nikolić sentencing judgment (n 396), paras 41-2.


521 M. Nikolić sentencing judgment (n 358), para. 67.
experience of the ICTY, ICTR and SPSC, which have made use of consensual avenue for different reasons, may attest to that.

But as a general matter and in light of the special objectives and idiosyncrasies of international criminal justice, there are compelling normative grounds for preferring the ‘imposed justice’ to ‘negotiated justice’ in the domain of international criminal courts. Such reasons are congenital to the administration of international criminal justice and can be expected to hold true as long as this project survives. Therefore, international criminal trial as a procedural phase will remain invulnerable to the ‘normative threats’ posed by trial-avoidance mechanisms. To a greater extent than in the domestic context, the trial will continue to be, in a true sense and on several levels, an indispensable and most important event in the chronology of international criminal proceedings. The normative emphasis on the trials as the exclusive loci of truth-finding through criminal process—and their empirical perseverance in the system of international justice—is a distinctive feature of international criminal procedure as a sui generis regime and a significant dividing line between international and national paradigms of procedural justice.

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522 See also Petrig, ‘Negotiated Justice’ (n 453), at 30.