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### International criminal trials: A normative theory

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**CHAPTER 7.****DEFINING THE TRIAL STAGE**

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**1. INTRODUCTION**

This Chapter opens Part III, which is the descriptive and analytical component of this study. This part dissects international criminal trials into its constituent sub-units, compares the procedural arrangements adopted by the nine jurisdictions covered in the book, and provides a critical analysis of the law and practice of those tribunals against the normative criteria introduced in the methodological Part I.<sup>1</sup> In line with the approach proposed at the opening of this book, this part covers the stages of trial preparation, opening stage, presentation of evidence, and closing stage. The findings and conclusions concerning the relative benefits and disadvantages presented by the regulatory frameworks and/or adjudicative practice of the courts as well as any problems in the procedural legacy of their courts thus identified, will feed in the normative account of the international criminal trials presented in the final Chapter 12.

Prior to embarking upon this exercise in ‘comparative international criminal procedure’, it is necessary and appropriate to agree on what is to be understood as the ‘trial stage’. The nature, phenomenology, and functions of international criminal trials as both legalistic and social events have been considered in a previous Chapter. The same concerns their distinct role in the context of a procedural system as well as their viability in light of the ‘threats’ posed by the ever-expanding functions of pre-trial process and the advance of the trial-avoidance techniques.<sup>2</sup> By contrast, this Part is premised on a formalistic legal approach to the ‘trial phase’ as a distinct unit of international criminal procedure. This take on ‘trial’ presupposes that the temporal boundaries of the trial stage are properly identified on the basis of the Statutes and Rules of Procedure and Evidence.

Serving as a brief introduction into Part III of the book, the present Chapter defines the formal notion of ‘trial’ in the procedural regimes of the jurisdictions covered here by delimiting its place in the procedural chronology and determines the trial’s internal structure or phasing.<sup>3</sup> In addition, it seeks to clarify the key terms such as ‘trial’ and its derivatives

<sup>1</sup> Chapters 2 and 3.

<sup>2</sup> Chapters 5 and 6.

<sup>3</sup> Chapter 4 (employing the same analytical approach in respect of domestic criminal trials).

(‘commencement of trial’, ‘trial phase’, and ‘trial stage’). These are often used interchangeably in the literature but they neither are necessarily understood uniformly nor mean the same set of procedural steps and activities. The Chapter attempts to define these terms with a greater precision, with reference to the formal language used in the Statute and RPE. This discussion is quite technical but indispensable in the context of the study, since the descriptive and analytical account that follows should rest on more than an arbitrarily chosen vocabulary. Moreover, the terms and labels are a lynchpin on which the litigation and court’s reasoning rest, so a principled and solid approach is a live practical issue whose importance is impossible to overestimate. Another objective of this Chapter is that it serves as a roadmap into the following overview of the principles, rules, and practices falling within the trial stage. Essentially, it introduces and justifies the division of the trial stage as the logical sequence of the rubrics of ‘trial preparation’, ‘opening statements’, ‘presentation of evidence’, and ‘closing stage’ and highlights any significant differences and similarities in the phasing of the trial stage in the jurisdictions surveyed.

At the outset, two remarks regarding the coverage of topics in this Part of the book are in order, independent of the formal approach and definitions offered in this Chapter. First, although ‘trial preparation’ is a judicial phase of the pre-trial process that temporally precedes the trial *stricto sensu*, its inclusion is deemed warranted due to the non-severable link between the trial preparation and the proper trial.<sup>4</sup> As has been highlighted previously,<sup>5</sup> the preparatory measures of case-management performed by the judges on the parties’ proposed evidence prior to trial, effectively shape the scope and length of those cases and set administrative fetters on the length of the evidence to be presented. This novel aspect of the judicial role has arguably been one of the most breathtaking developments in international criminal procedure. Quite expectedly, it has given rise to important questions of the distribution of competences between the parties and the court and has been a live issue in the daily practice of the *ad hoc* tribunals. Those developments are best covered in the book on the trial phase because it may be impossible to appreciate how the case to be presented at trial comes to be formulated and on what basis the trial court exercises its managerial role throughout the trial. Secondly, the seminal component of the post-trial procedure—the phase of deliberations and judgment-making—does fall within the temporal scope of the ‘trial stage’ in a broad sense, but, as noted in the Introduction, this phase is too extensive and gives rise to unique issues that deserve to be dealt with in a separate study.

The discussion in the present Chapter is structured as follows. The following section (2) provides the textual and comparative analysis of the legal frameworks of the jurisdictions covered. It seeks to establish how the ‘trial’ and ‘trial stage’ are formally defined in the rules, if at all; how they are delimited within the overall structure of the process, including the landmarks flagging the formal beginning and the end of the trial; and how the trial stage breaks down into constituent phases. The purpose is not to provide a detailed account of the individual phases of trial process, which is the task reserved for the following chapters 8 through 11. Rather, the objective is to stipulate what the confines of the trial stage are and of which procedural steps it is composed. Section 3 takes the matter beyond terminological clarification. It uses several examples from the ICC practice to demonstrate that the questions of when the trial formally starts or ends and what steps are comprised within its temporal framework are far from being idle academic queries but live issues in the procedural practice of the courts. The focus on the ICC does not imply that similar examples could not be found in the procedural record of other tribunals. But because this section merely intends to briefly illustrate the practical importance of the formal distinction between the different phases of trial process, the discussion is not meant to be comprehensive in comparative terms. Finally, the Chapter will conclude with a comparative summary on the boundaries and chronology of

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<sup>4</sup> See Chapter 8.

<sup>5</sup> Chapter 6.

the trial stage and propose a synthetic definition of the trial stage and its breakdown into phases based on the average status in the jurisdictions overviewed.

## 2. SCOPE AND STRUCTURE OF THE TRIAL PHASE

### 2.1 IMT and IMTFE

Article 24 of the IMT Charter provided for the composition and phases of the trial. It stipulated that '[t]he proceedings at the Trial shall take the following course' and listed eleven steps:

- (a) The Indictment shall be read in court;
- (b) The Tribunal shall ask each Defendant whether he pleads 'guilty' or 'not guilty';
- (c) The Prosecution shall make an opening statement;
- (d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence;
- (e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence;
- (f) The Tribunal may put any question to any witness and to any Defendant, at any time;
- (g) The Prosecution and the Defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony;
- (h) The Defence shall address the court;
- (i) The Prosecution shall address the court;
- (j) Each Defendant may make a statement to the Tribunal;
- (k) The Tribunal shall deliver judgment and pronounce sentence.

Given that all items except for (f) and (j) are formulated as mandatory steps in the trial sequence, the IMT trial process was subject to fairly rigid regulation, as compared to flexible evidentiary rules.<sup>6</sup> Judicial questioning under (f), however, is not a slot in the chronology but a power-conferring provision authorizing the Tribunal to pose questions in either stage of questioning, including examination and cross-examination of witnesses and defendants (g) during both case-in-chief and rebutting stage (e).

As a reflection of a hybrid character of the IMT process,<sup>7</sup> its structure features elements extraneous to the organizing adversarial framework. First, only the prosecution was entitled to make an opening statement (c) after the reading out of the charges and pleas. But the defence was not formally entitled to address the Court at the opening stage; as will be discussed in a due course, this would be objectionable in modern international criminal procedure.<sup>8</sup> Secondly, the order of concluding addresses of the parties strikes the common-law trained eye as reverse. Article 24 (h) and (i) let the prosecution have the floor last, while in modern practice the right to address the court last is normally reserved for the defence.<sup>9</sup> Thirdly, the step (j) allowed each accused to make a statement neither under oath nor subject to cross-examination, in addition to the possibility of giving sworn testimony and addressing the Tribunal through the defence counsel's closing statements. This prerogative was 'not wholly unknown to the common law, but almost so'.<sup>10</sup>

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<sup>6</sup> Art. 19 IMT Charter.

<sup>7</sup> Chapter 1.

<sup>8</sup> See Chapter 9.

<sup>9</sup> See Chapter 11. E.g. Rule 86(A) ICTY, ICTR, and SCSL RPE; Rule 141(2) ICC RPE.

<sup>10</sup> J. Bush, 'Lex Americana: Constitutional Due Process and the Nuremberg Defendants', (2001) 45 *Saint Louis University Law Journal* 515, at 526-7 ('where unsworn statements were allowed at common law, the right was historically in lieu of the defendant's right to testify under oath. At Nuremberg, the cobbling together of common law procedure with some elements of civil law (which did allow unsworn statements) meant that the defendants had three separate opportunities to speak to the court: as witness, through counsel's closing argument, and through the unsworn personal closing statement.').

## Chapter 7: Defining the Trial Stage

The IMTFE Charter was essentially modeled on the IMT Charter.<sup>11</sup> But it was drafted by Americans and was largely ‘their’ project.<sup>12</sup> It was promulgated unilaterally by the Special Declaration of the Supreme Commander of the Allied Powers in Japan General Douglas MacArthur (US) and without input from other Allied Powers.<sup>13</sup> As a result, the Charter followed more closely the adversarial layout of trial, as reflected in the structure of the trial that diverged from the Nuremberg trial structure in several respects. At the IMTFE, ‘the proceedings at Trial’ comprised the following steps:

- (a) The indictment will be read in court unless the reading is waived by all accused.
- (b) The Tribunal will ask each accused whether he pleads ‘guilty’ or ‘not guilty’.
- (c) The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.
- (d) The prosecution and defence may offer evidence and the admissibility of the same shall be determined by the Tribunal.
- (e) The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.
- (f) Accused (by counsel only, if represented) may address the Tribunal.
- (g) The prosecution may address the Tribunal.
- (h) The Tribunal will deliver judgment and pronounce sentence.<sup>14</sup>

The IMTFE trial layout comprises fewer procedural steps. In departure from Article 24(j) of the IMT Charter, the trial layout at the IMTFE left the stage for defendants’ statements out altogether. Thus, each of the Nuremberg accused had the second ‘bite at a cherry’ in the form of a concluding unsworn statement after the closing arguments by defence and prosecution counsel, whereas unsworn statements from the dock were disallowed at Tokyo and the defence enabled to make an opening statement, which is reflective of the ‘adversarial’ thinking. The formulation and location of the judicial power to question witnesses or accused freely (Article 24(f) of the IMT Charter) were changed. The IMTFE Charter, in Article 11(b) rather than 15, conferred on the Court a less ambitious power ‘to interrogate each accused and to permit comment on his refusal to answer any question’ (thus on the face of it taking away the power to question witnesses).

The juxtaposition of Article 24 of the IMT Charter and Article 15 of the IMTFE Charter reveals other differences between the Tokyo and Nuremberg trial layouts: (i) the reading of indictment is mandatory *unless waived* by all accused;<sup>15</sup> (ii) the defence counsel for each accused (or accused if unrepresented) and not only the Prosecution may make a *concise* opening statement; (iii) the Tokyo Charter did not spell out the order of presentation of

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<sup>11</sup> B.V.A. Röling and A. Cassese, *The Tokyo Trial and Beyond – Reflections of a Peacemonger* (Oxford: Polity Press, 1993) 2; A.M. Danner, ‘Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism’, (2005) 46(1) *Virginia Journal of International Law* 83, at 89; R. Minear, *Victors’ Justice – The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971) 20-1.

<sup>12</sup> Minear, *Victors’ Justice* (n 11), at 20 and Danner, ‘Beyond the Geneva Conventions’ (n 11), at 88-9. See also Röling and Cassese, *The Tokyo Trial and Beyond* (n 11), at 31 (‘In fact the Americans were in control of most aspects of the trial. The trial was very much an American performance.’).

<sup>13</sup> The IMTFE Charter was promulgated under Special Proclamation: Establishment of an International Military Tribunal for the Far East, 19 January 1946, TIAS No. 1589, at 3, which is to be read together with the source of exclusive authority of the Supreme Commander – Instrument of Surrender, signed at Tokyo Bay, Japan on 2 September 1945 (‘The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.’).

<sup>14</sup> Art. 15 IMTFE Charter.

<sup>15</sup> By comparison, at Nuremberg, the prosecutors and defence counsel jointly requested the Tribunal to read out only the summary of the Indictment given its length, but the request was denied. T. Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Little, Brown and Co., 1992) 163 (explaining the request was denied due to prosaic rather than principled reasons).

## Chapter 7: Defining the Trial Stage

evidence, unlike Article 24(e) of the Nuremberg Charter;<sup>16</sup> (iv) the Tokyo Charter entitled rather than mandated the parties to examine witnesses (cf. Article 24(g) of the IMT Charter) and did not use the term ‘cross-examination’; (v) under Article 15(f)-(g) of the IMTFE Charter, the closing addresses ‘may’ rather than ‘shall’ be made, with the prosecution having the last word.

Generally, the structure of trial proceedings at Tokyo was more inclined towards an undiluted adversarial model than that of the Nuremberg trial.<sup>17</sup> One can make little of these differences in the structure of trial in support of the claim that the Nuremberg Charter was more favourable to the defence than the Tokyo Charter.<sup>18</sup> That said, the Tokyo proceedings as managed by the President are typically overshadowed by more vocal criticisms on the grounds of fairness than the Nuremberg process.<sup>19</sup> Among others, this is illustrated by the way in which the opening statements and final arguments were handled. As will be discussed in a due course, the parties were not accorded full procedural equality in the number of interventions they were allowed to make, sometimes in departure from the letter of the Charter.<sup>20</sup>

The delimitation of the trial from other stages at Nuremberg and Tokyo does not pose serious challenges of interpretation. This is due to the virtual lack of the judicial pre-trial and appellate stage and because the language of Article 24 of the IMT Charter and Article 15 of the IMTFE Charter was clear in demarcating the beginning and the end of the trial stage. Under the Charters, the trial stage commenced with the reading of the indictment in open court and the pleas by the accused responding to the indictment, and ended in a delivery of judgment and the pronouncement of the sentence. Presumably in line with the common law leanings, however, some insiders referred to the prosecution opening statements as the start of trial.<sup>21</sup> This may also be related to the absence of any judicial involvement in the pre-trial phase, so the reading of the indictment and pleas were not regarded as core but merely preliminary activities, formalities to be cleared before the trial could start. This signals some terminological differences. Namely, the ‘trial proceedings’ and ‘trial stage’, dubbed as ‘proceedings at Trial’ in the IMT and IMTFE Charters, signify a broader set of activities spanning over preliminary and post-trial matters (deliberations and judgment), whereas the ‘trial’ refers to the core component of that set encompassing the parties’ interventions and evidence.

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<sup>16</sup> N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008) 92 (despite the absence of explicit authorization, the IMTFE permitted both parties to present rebuttal evidence, if of probative value and material, but only the prosecution used this opportunity).

<sup>17</sup> *Ibid.*, at 86 (considering the ‘course of the trial proceedings’ under Art. 15 IMTFE Charter ‘standard for a common law trial apart from the granting of rights to both parties to make a concise opening statements (Art. 15(c)) and to address the Tribunal (Art. 15(f) and (g)).’ See also *ibid.*, at 87 (referring to the right under Art. 15(c) as ‘a relative stranger to the common law’).

<sup>18</sup> K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (Leiden/Boston: Martinus Nijhoff, 2006) 12 n33.

<sup>19</sup> Among others, see Minear, *Victors’ Justice* (n 13), at 74-125; Röling and Cassese, *The Tokyo Trial and Beyond* (n 11), at 4-5; 51 (according to Judge Röling, in applying rules of evidence, ‘the Tribunal was inconsistent and often favoured the prosecution’, while ‘[t]he defendants were in a clearly inferior position’); Danner, ‘Beyond the Geneva Conventions’ (n 11), at 88 (‘Comparisons between the IMTFE and its more celebrated counterpart, the [IMT], typically redound to the benefit of the latter’), 91 (apart from cultural and linguistic problems, the Tokyo trial was overshadowed by racism against Japanese), and 92-3 (the defence had difficulties securing access to the documents).

<sup>20</sup> Chapters 9-11. See e.g. Boister and Cryer, *The Tokyo International Military Tribunal* (n 16), at 91-92 (the prosecution was permitted three opening statements in the general phase of its case, whereas the defence was permitted to make one; during closing arguments, the IMTFE gave the prosecution one extra opportunity to speak before the concluding address by the defence in deviation from Art. 15).

<sup>21</sup> Taylor, *The Anatomy of the Nuremberg Trials* (n 15), at 167. Cf. A. Tusa and J. Tusa, *The Nuremberg Trial* (London: Macmillan, 1983) 150 (referring to the day when the pleas were entered as the second day of the trial).

## 2.2 ICTY, ICTR, and SCSL

The temporal demarcation of trial in the structure of proceedings at the ICTY, ICTR and SCSL is less apparent. The legal texts of those courts use a variety of terms such as ‘trial’, ‘hearing’, ‘trial proceedings’, and ‘proceedings before the Trial Chamber’ which, upon closer scrutiny, denote different procedural intervals. The statutes of the *ad hoc* tribunals—but not that of the SCSL—contain an identical article entitled ‘Commencement and Conduct of Trial Proceedings’, which presents a skeletal outline of the structural composition of the trial process:

The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.<sup>22</sup>

Read in light of the article’s title, the provision suggests that the ‘trial proceedings’ commence as early as with the Chamber’s reading the indictment in court, ensuring that the accused understands it, and its instruction to the accused to enter a plea. But the second sentence implies that ‘trial’ forms part of ‘trial proceedings’ and begins at a later stage after the Chamber sets the date for it. The statutes of the *ad hoc* tribunals and the SCSL provide no guidance as to the internal structure of ‘trial’, but their RPE do. The Rules set out the following phases: (1) opening statements and, at the ICTY, statement by the accused;<sup>23</sup> (2) the presentation of evidence and examination of witnesses;<sup>24</sup> (3) closing arguments;<sup>25</sup> (4) deliberations;<sup>26</sup> (5) judgement<sup>27</sup> and sentencing procedures.<sup>28</sup>

The ICTY and ICTR statutes provide sufficient basis for a formal distinction between, on the hand, ‘trial proceedings’ and, on the other hand, ‘trial’ *stricto sensu* (or ‘hearing’). The former is a catch-all term encompassing the acts and actions occurring from the taking into custody of the accused (including initial and further appearances and preparatory conferences) until the public delivery of the trial judgment and sentence. But ‘trial’ emerges as the central component of the ‘trial proceedings’ during which pleadings on the merits are made and the evidence is presented before the court. The ‘trial’ starts with the opening statements and ends with the formal closing of the ‘hearing’ by the Trial Chamber’s presiding judge right before the deliberations start off.<sup>29</sup>

The formal separation of ‘trial’ from the procedure for the preparation for the trial is made starker and along somewhat different line in the Rules. There, the provisions governing the proceedings leading up to trial and those regarding trial are indexed under different Parts. Since the Rules redistribute the segments of the process under different formal stages, the nomenclature of procedural standards regarding the initial and further appearances and the ‘trial’ within the structure of the Rules deserves a comment. A glance at the structure of the Rules reveals that the proceedings upon the transfer of the accused to the Tribunal and those prior to ‘trial’—initial and further appearances, plea agreements, status conferences etc.—are contained respectively in Section 3 (‘Preliminary Proceedings’) of Part Five of the ICTY RPE (‘Pre-Trial Proceedings’) and Section 2 (‘Orders and Warrants’) of Part Five of the ICTR RPE.<sup>30</sup> This structure indicates that the procedural interval spanning from the arrival of the

<sup>22</sup> Art. 20(3) ICTY Statute; Art. 19(3) ICTR Statute.

<sup>23</sup> Rule 84 and 84*bis* ICTY RPE; Rule 84 ICTR and SCSL RPE.

<sup>24</sup> Rule 85 ICTY, ICTR, and SCSL RPE.

<sup>25</sup> Rule 86 ICTY, ICTR, and SCSL RPE.

<sup>26</sup> Rule 87 ICTY and ICTR RPE

<sup>27</sup> Rule 98*bis* and 98*ter* ICTY RPE; Rule 88 ICTR and SCSL RPE

<sup>28</sup> Rule 100-106 ICTY and SCSL RPE; Rule 100-105 SCSL RPE.

<sup>29</sup> Rule 87(A) ICTY, ICTR, and SCSL RPE (‘When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed’).

<sup>30</sup> See Rules 61–65*ter* ICTY RPE; Rules 62–65*bis* ICTR RPE; Rule 61–65*bis* SCSL RPE (also included in Part Five on ‘Pre-Trial Proceedings’).

accused to the Tribunal and his or her initial appearance up to the start of the ‘trial’ falls within the judicial phase of *pre-trial proceedings*, even though, as noted, Article 20 of the ICTY Statute and Article 19 of the ICTR Statute treat those preliminary proceedings as part of ‘trial proceedings’.<sup>31</sup>

The rules concerning the core trial activities form part of Sections 2 (‘Case Presentation’), 4 (‘Judgement’) and 5 (‘Sentencing and Penalties’) of Part Six of the RPE of the ICTY, or Sections 2 (‘Case Presentation’) and 4 (‘Sentencing Procedure’) of Part Six of the ICTR and SCSL RPE. In the Rules of all three courts, Part Six is entitled ‘Proceedings before the Trial Chambers’ rather than ‘Trial Proceedings’ or ‘Trial’, in contrast to adjacent Parts Five and Seven (respectively entitled as ‘Pre-Trial Proceedings’ and ‘Appellate Proceedings’ and demarcating the pre-trial and appeal stage). It is unclear what the implications are of the use of the term ‘proceedings before the Trial Chambers’ and how it correlates with the notion of ‘trial’. It may well be that the denomination of Part Six (‘Proceedings before the Trial Chambers’, as opposed to ‘Trial Proceedings’) was intended since the latter heading would have been the first one to suggest itself by analogy with the titles of Parts Five and Seven.

If so, the choice of terminology may have been unfortunate because the level of the Chamber before which certain proceedings take place is not a failproof criterion for determining the current phase of the case. For example, the interlocutory appeals which take place before the Appeals Chamber do not imply that the Trial Chamber is no longer seized with the case and that the proceedings have entered into the appellate stage. At the *ad hoc* tribunals and the SCSL, the proceedings involving judicial participation except for confirmation of the indictment and appeals unfold before trial chambers and/or designated (pre-trial) judge, in the absence of a pre-trial chamber. Certain procedural acts of preliminary character—the appearances, pleas disclosure and pre-trial conferences—are clearly not ‘trial’ *stricto sensu*.<sup>32</sup> At the same time, other procedural events taking place before ICTY trial chambers and perfectly within the temporal framework of the trial process are governed by provisions located not in Part Six but elsewhere.<sup>33</sup> That said, entitling Part Six of the RPE as ‘Trial Proceedings’ (instead of the current title) would have put the structure of the RPE at odds with Article 20 of the ICTY Statute and Article 19 of the ICTR Statute, which frame ‘trial proceedings’ in a way broader than the procedural steps covered by Part Six. As noted, ‘trial proceedings’ as per ICTY and ICTR statutes encompass all judicial activities including those taking place before ‘trial’, whereas Part Six is confined to ‘trial’ proper, being ‘trial proceedings’ in the narrow sense.

This discussion illustrates that the terminology denoting the milestones of the procedural chronology is not consistent and does not emerge clearly based on a literal reading of the statutes and RPE. Some ICTY judges have indeed appeared baffled by the question of what the Rules define as the ‘commencement of trial’.<sup>34</sup> The weak formalization of the judicial pre-trial phase and the partial confluence between the pre-trial and trial process under the authority of the same Trial Chamber may explain why demarcating the ‘trial phase’ at the ICTY, ICTR, and SCSL on the basis of their legal texts presents difficulties. Since there is no

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<sup>31</sup> See also *ICTY Manual on Developed Practices* (Turin: ICTY-UNICRI, 2009) 54, para. 5 (‘Pre-trial proceedings should begin the moment the accused arrives at the seat of the Tribunal.’).

<sup>32</sup> E.g. Rule 73bis(A) ICTY RPE (‘Pre-Trial Conference’) (‘Prior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference.’ Emphasis added.) The Rule is contained in Part Five (‘Pre-Trial Proceedings’) of the ICTY Rules. However, Rule 73bis(A) ICTR RPE is placed in Part Six (‘Proceedings before Trial Chambers’), even though pre-trial conferences fall outside of the scope of ‘trial’.

<sup>33</sup> See e.g. Rule 73ter(A) (‘Pre-Defence Conference’) (‘Prior to the commencement by the defence of its case, the Trial Chamber may hold a Conference.’). Note, however, that Rule 73ter(A) ICTR RPE is contained in Part Six.

<sup>34</sup> Transcript, *Prosecutor v. Šešelj*, Case No. IT-03-67, TC III, ICTY, 23 October 2007, at 1624 (lines 18-23: ‘it is true that the Rules of Procedure and Evidence are not very specific as to the start of the trial, and you have to really look at the title of section 1 [sic], case presentation, as well as section 1 of chapter 6 to note that the trial is provided for in the regulation but nothing is said about the beginning of trial.’).



institutionally separate pre-trial chamber or judge solely tasked with the conduct of pre-trial business, the tasks of pre-trial management and preparation of the case for trial rests with the Trial Chamber that will try the case. Thus, the trial court bears ultimate responsibility for the shape in which a case reaches it, in the sense of trial-readiness. As is discussed elsewhere in detail, the functions of a pre-trial judge at the ICTY and designated judge at the ICTY are not formally isolated from those of the full Chamber.<sup>35</sup> Moreover, they are auxiliary by nature and aimed at coordinating and expediting the trial-preparation and facilitating the Chamber's performance as a managerial court.<sup>36</sup>

The understanding of 'trial' as the 'proceedings before the Trial Chamber' in the narrow sense of Part Six and opposed to broader 'trial proceedings' in sense of Article 20 of the ICTY Statute and Article 19 of the ICTR Statute appears to be optimal. It also corresponds to interpretations given by the judges in the course of proceedings. For instance, the ICTY Judges have referred to the opening statement by the prosecution as the moment at which the Court may 'open and start the trial proper' and regarded the commencement of the case presentation as the kick-off moment of the trial at the latest.<sup>37</sup> Although the terms 'trial phase' and 'trial' may be subject to diverging interpretations, a reference to 'trial' in the strict sense in the context of the ICTY, ICTR, and SCSL implies a core segment of 'trial proceedings' that encompasses opening statements, presentation of evidence, and closing arguments. The judicial phase of the pre-trial proceedings spanning from the initial appearance to the trial's opening day as well as deliberations and judgment, which are post-trial activities conducted by the Trial Chamber on its own, are excluded from the scope of 'trial' but they do form part of the broader catch-all term 'trial proceedings'.

### 2.3 ICC

The procedure at trial before the ICC is regulated by Part 6 of the ICC Statute ('The Trial'), which is placed between Part 5 ('Investigation and Prosecution') and Part 7 ('Penalties'). The structure of the Rules of Procedure and Evidence follows that of the Statute, so the trial process is governed by Chapter 6 ('Trial Procedure') preceded by a chapter on investigation and prosecution and followed by that on penalties.

Most commentators associate the commencement of trial proceedings with the completion of the confirmation of charges procedure.<sup>38</sup> The ICC pre-trial stage is formally

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<sup>35</sup> Chapters 6 and 8

<sup>36</sup> Rule 65ter(B) ICTY RPE ('The pre-trial Judge shall, under the authority and supervision of the Trial Chamber seized of the case, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.'). According to ICTY Rule 65ter(C), the pre-trial Judge is entrusted with functions related to the coordination of disclosure by the parties (Rules 66-67), the preparation for the Pre-Trial and Pre-Defence Conferences (Rule 73bis and 73ter ICTY RPE), other motions (Rule 73 ICTY RPE), in addition to the elaboration of the work plan (Rule 65 ter(D) ICTY RPE).

<sup>37</sup> Transcript, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, TC, ICTY, 17 August 1998, at 69 (lines 12-13, per Judge Cassese); Transcript, *Prosecutor v. Šešelj*, Case No. IT-03-67, TC III, ICTY, 23 October 2007, at 1624 (lines 5-6: 'the start of the trial is provided for in section 2, case presentation'; lines 14-18: 'Trial doesn't start while it's still in the Status Conference procedure; this is only a procedural step. The trial starts when you have the opening statements provided for in Rule 84 and then the presentation of evidence with witnesses'; lines 23-24: 'normally, beginning of trial is when you have the presentation of the cases, of course with the calling of witnesses.').

<sup>38</sup> H. Friman, 'Investigation and Prosecution', in R. Lee *et al.* (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsey: Transnational, 2001) 531 (referring to the confirmation of charges as 'the border between the pre-trial and trial stages'); H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2005) 51 ('Once the charges are confirmed by the PTC in accordance with art. 61(1) RS, the trial stage aimed at the preparation and holding of the trial starts under the direction of the TC.'); G. de Beco, 'The Confirmation of Charges before the International Criminal Court: Evaluation and First Application', (2007) 7 *International Criminal Law Review* 469, at 480; K. Ambos and D. Miller, 'Structure and Function of the Confirmation Procedure before the ICC

over with the notification of the Pre-Trial Chamber's decision on the confirmation of charges and the transmittal of both the decision and the record of the proceedings of the PTC to the Presidency pursuant to Rule 129.<sup>39</sup> The PTC decision under Article 61(7)(b) to decline to confirm charges signifies the end of the proceedings and thus of the pre-trial stage, even though the prosecutor may subsequently submit a request to confirm the charges based on additional evidence (Article 61(8) of the ICC Statute). But self-evidently, the trial process is not apt to commence where the charges have been declined because no person was committed for trial and there is no case to seize the Trial Chamber with; the delimitation issue does not arise. By contrast, a decision to adjourn a confirmation hearing and to request the prosecutor to conduct further investigation or provide further evidence under Article 61(7)(c)(i) does not result in the discontinuance of the pre-trial stage.

According to the textual interpretation of the ICC Statute, the procedural milestone which signifies the commencement of the 'trial proceedings' is the constitution by the Presidency of the Trial Chamber responsible for the conduct of subsequent proceedings as well as the referral of the case to the newly or previously constituted Trial Chamber along with the pre-trial record and the confirmation decision.<sup>40</sup> The bulk of standards governing the trial proceedings are formulated as powers of the Trial Chamber, distinct from the competences of the Pre-Trial Chamber. This institutional division formalizes the judicial function at trial as being separate from any pre-trial functions and ordinarily serves as a watershed between the stages. That said, the borderline between the pre-trial and trial proceedings does not always match the moment of the transfer of authority over the charges and the case from the Pre-Trial Chamber to the Trial Chamber because the former's authority over the case may continue in the period after the Trial Chamber is constituted.

Thus, Article 61(9) provides that '[a]fter the charges have been confirmed and *before the trial has begun*', the responsibility for the charges lies with the Pre-Trial Chamber. It is the sole organ competent to amend the earlier confirmed charges and to give a permission to add charges or substitute more serious charges, subject to the confirmation hearing on those new charges. The Trial Chamber may be moved to withdraw—but not to aggravate or substitute—the charges only '[a]fter the commencement of the trial'.<sup>41</sup> Secondly, in accordance with Article 64(4), the Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or to another available judge of the Pre-Trial Division. As reported by one negotiator, this paragraph 'was intended to give some flexibility to the Trial Chamber with regard to issues that might more appropriately be dealt with by the Pre-Trial Chamber', which may include 'questions of whether evidence was

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from a Comparative Perspective', (2007) 7 *International Criminal Law Review* 335, at 336 and 338 (referring to a decision to confirm or to decline to confirm charges as the end of the pre-trial phase).

<sup>39</sup> Rule 129 ICC RPE ('The decision of the Pre-Trial Chamber on the confirmation of charges and the committal of the accused to the Trial Chamber shall be notified, if possible, to the Prosecutor, the person concerned and his or her counsel. Such decision and the record of the proceedings of the Pre-Trial Chamber shall be transmitted to the Presidency').

<sup>40</sup> Art. 61(11) ICC Statute ('Once the charges have been confirmed ..., the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.'). Rule 130 ICC RPE ('When the Presidency constitutes a Trial Chamber and refers the case to it, the Presidency shall transmit the decision of the Pre-Trial Chamber and the record of the proceedings to the Trial Chamber. The Presidency may also refer the case to a previously constituted Trial Chamber.'). See also Ambos and Miller, 'Structure and Function of the Confirmation Procedure' (n 39), at 338 ('the trial phase begins with the case being sent to the Trial Chamber.').

<sup>41</sup> Art. 61(9) ICC Statute ('After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this Article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.').

obtained in accordance with any warrants issued' by the PTC.<sup>42</sup> These provisions provide for limited exceptions to the exclusive authority of the Trial Chamber pursuant to Article 61(11) over the conduct of post-confirmation proceedings.

In *Lubanga*, the Trial Chamber recognized that the legal framework is lacking in precision concerning the issue of when the 'trial' may be considered to have formally begun. But the Chamber then opined that 'this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses'.<sup>43</sup> This implies, again, the need for a terminological distinction between the notions of 'trial proceedings' and 'trial'. As will be shown below, the interpretation of these terms in the jurisprudence has not been consistent and led to controversies. Thus, the *Katanga and Ngudjolo* Trial Chamber espoused the interpretation of 'trial' as the stage that commences 'as soon as the Chamber is constituted'.<sup>44</sup> The divergence in the approaches to determining the moment of the commencement of trial across the Chambers reveal the chronology-related ambiguities in the ICC legal texts and the practical relevance of the seemingly formal distinction between 'trial' and 'trial proceedings'.

Before that, the formal structure of 'trial proceedings' before the ICC, as provided for by the ICC legal instruments, should be addressed. The statutory provisions relevant to the phasing of trial proceedings are dispersed throughout Part VI of the Statute most of which details the powers and functions of the Trial Chamber. The structure and phasing of the trial proceedings at the ICC is not made explicit, but it is possible to distinguish the following three stages: (1) proceedings leading up to the trial; (2) the trial (including the commencement of the trial, opening statements, presentation of evidence, and closing statements); and (3) post-trial stage (deliberations, delivery of judgment pursuant to Article 74, sentencing procedure, and reparation). Since each of these components can further be disassembled into smaller procedural steps, it is instructive to 'zoom in' by exposing the sub-structures and ordering of the ICC trial proceedings.

*(1) Proceedings leading up to the trial:*

Although this expression is not used in the ICC legal instruments, it conveniently describes the preparatory procedural sub-stage intervening between the constitution of the Trial Chamber and the opening of the trial hearing. Trial Chamber I used the term in *Lubanga* when inviting the parties to make submissions and deciding upon the modalities of victim participation in the period leading up to, and during, the trial.<sup>45</sup> The 'trial' before the ICC is preceded by a host of measures meant to prepare the parties, to ensure that the trial proceeds efficiently and without delays or postponements, and to expeditiously dispose of all household matters. Article 64(3) stipulates that 'upon assignment of a case for trial', the Trial Chamber shall take the following steps:

- (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
- (b) Determine the language or languages to be used at trial; and

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<sup>42</sup> H.-J. Behrens, 'The Trial Proceedings', in R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 240 (noting also that the transfer of issues to the PTC was deemed as allowing to ensure more expeditious proceedings).

<sup>43</sup> 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* status of evidence trial decision'), para. 39.

<sup>44</sup> See *infra* 3.

<sup>45</sup> Decision on Victims' Participation, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008, at 1 and para. 1. See also, in the same case, Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC-01/04-01/06-947, 5 September 2007; Order amending schedule for hearing, ICC-01/04-01/06-977, 9 October 2007.

## Chapter 7: Defining the Trial Stage

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

In addition, Article 64(5), as supplemented by Rule 136, adds to this the possibility for the Chamber, upon notice to the prosecution and the defence, to order joinder or severance of charges. Therefore, the steps to be taken or issues to be dealt with by the Chamber upon the assignment of the case are: (a) consultation with the parties regarding procedures to be adopted; (b) language issues; (c) disclosure; and (d) joinder and severance.

The main method of preparatory work to be executed by the Trial Chamber in the lead up to the trial, is status conferences.<sup>46</sup> Rule 132 provides that a status conference is to be held ‘promptly’ upon the constitution of the Trial Chamber in order to set the date for trial and to confer with the parties on the ways to facilitate the fair and expeditious conduct of the proceedings. Prior to the commencement of the trial, Rule 134(1) authorizes the Chamber to rule, *proprio motu* or at the request of the parties, on any issue concerning the conduct of the proceedings. Regulation 54 of the Regulations of the Court further details these Rules as it sets out a list of sixteen items which exemplify—but do not exhaust—the issues the Trial Chamber may rule on at the status conference, in the interests of justice, for the purpose of the trial proceedings.<sup>47</sup>

### (2) Trial:

The completion of the preparatory stage is another milestone in the progression of the trial process, and it marks the opening phase of the trial – or, as Article 64(8)(a) labels it, the ‘commencement of the trial’.<sup>48</sup> According to this key statutory provision regarding the composition of the ‘commencement stage’, the steps encompassed therein include: (1) reading of the confirmed charges; (2) the Chamber satisfying itself that the accused understands their nature; and (3) inviting the accused an opportunity to make an admission of guilt or to plead not guilty. It may be recalled that similar steps make up the opening phase of the ‘proceedings at Trial’ at the IMT and IMTFE. Whereas at the *ad hoc* tribunals, the reading of the indictment and instruction to enter a plea are not part of the ‘trial’ but fall within the ‘commencement of the trial proceedings’ (Article 20 of the ICTY Statute and Article 19 of the ICTR Statute), or are comprised within the judicial phase of pre-trial proceedings under the Rules.<sup>49</sup>

Steps mentioned in Article 64(8)(a) do not exhaust the subject-matter of the ‘commencement’ phase. According to Rule 133, challenges to the jurisdiction of the Court or the admissibility of the case may be brought at the stage of the ‘commencement of the trial’.

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<sup>46</sup> See Chapter 8.

<sup>47</sup> Regulation 54 ICC Regulations of the Court (‘(a) The length and content of legal arguments and the opening and closing statements; (b) A summary of the evidence the participants intend to rely on; (c) The length of the evidence to be relied on; (d) The length of questioning of the witnesses; (e) The number and identity (including any pseudonym) witnesses to be called; (f) The production and disclosure of the statements of the witnesses on which the participants propose to rely; (g) The number of documents as referred to in Art. 69, paragraph 2, or exhibits to be introduced together with their length and size; (h) The issues the participants propose to raise during the trial; (i) The extent to which a participant can rely on recorded evidence, including the transcripts and the audio- and video-record of evidence previously given; (j) The presentation of evidence in summary form; (k) The extent to which evidence is to be given by an audio- or videolink; (l) The disclosure of evidence; (m) The joint or separate instruction by the participants of expert witnesses; (n) Evidence to be introduced under rule 69 as regards agreed facts; (o) The conditions under which victims shall participate in the proceedings; (p) The defences, if any, to be advanced by the accused.’).

<sup>48</sup> Art. 64(8)(a) ICC Statute (‘At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with Art. 65 or to plead not guilty.’).

<sup>49</sup> See *supra* 2.3 and text accompanying n 30.

Rule 134(2) establishes the duty of the Chamber, at that stage, to ask the parties whether there are any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearing. As regards the timing for bringing challenges to the jurisdiction or the admissibility, Rule 133 further provides that where these are brought subsequently to the commencement of the trial, leave of the Chamber is required.<sup>50</sup> It is more logical and indeed preferable if such challenges are received and decided prior to the steps laid down in Article 64(8)(a), but there may be circumstances in which challenges brought at a later stage will be admitted. A medical, psychiatric or psychological examination of the accused, which the Trial Chamber may order *proprio motu* or at a party's request, for any reason, including to discharge its obligations under Article 64(8)(a), may also fall within the temporal framework of the 'commencement' stage.<sup>51</sup>

Another element of the 'commencement' proceedings under the Statute is the procedure for the admission of guilt.<sup>52</sup> In case the accused makes an admission of guilt and depending on whether the Chamber is satisfied that the admission fulfils the requirements of Article 65(1), the Chamber is faced with the three options: (i) considering the admission, along with any evidence, as establishing all the essential fact and convicting the accused; (ii) considering the admission as not having been made and ordering an ordinary trial; and (iii) requesting the prosecution some additional evidence with view to more complete presentation of the facts.<sup>53</sup> Where the accused in a joint case makes an admission of guilt which is accepted pursuant to Article 65(2), the issue of severance of trials will arise and should be decided in order 'to avoid serious prejudice to the accused' or 'to protect the interests of justice'.<sup>54</sup>

When it comes to the trial hearings, it could have been expected that in an ambitious codification project such as the ICC system, the structure of trial and the order of the examination of evidence would be spelt out in a fairly detailed manner. However, this is not the case – the ICC legal instruments provide only limited guidance on the procedure at a trial hearing. As a result of the diplomatic nature of the negotiations leading up to the adoption the Statute,<sup>55</sup> it leaves it largely to the Trial Chamber to flesh out the trial framework.<sup>56</sup> Article 64(8)(b) merely provides:

At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

This power is supplemented by Rule 134(3) providing the Trial Chamber with the competence to rule on any issue arising in the course of the trial on its own motion or at the request of the prosecutor or the defence.

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<sup>50</sup> Rule 133 ICC RPE ('Challenges to the jurisdiction of the Court or the admissibility of the case at the commencement of the trial, or subsequently with the leave of the Court, shall be dealt with by the Presiding Judge

and the Trial Chamber in accordance with rule 58').

<sup>51</sup> Rule 135 ICC RPE.

<sup>52</sup> Articles 64(8)(a) and 65 ICC Statute; Rule 139 ICC RPE.

<sup>53</sup> Art. 62(2)-(4) ICC Statute. See further Chapter 6.

<sup>54</sup> Rule 136(1) ICC RPE.

<sup>55</sup> In more detail, see Chapter 1.

<sup>56</sup> See C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', (2003) 1 *JICJ* 603, at 605-6 ('whereas the ICC Statute and the Rules ... together have achieved a remarkable degree of procedural precision in some respects, a closer look reveals that the diplomatic technique of creating *constructive ambiguity* has been applied at a number of strategically important points. This means that the shaping of the overall architecture of the ICC proceedings has been left to the judges') and 613 (in terms of 'how the ICC trial will be structured', '[a]gain, the language of the normative framework is rather vague').

While the Statute does not even mention opening statements, the RPE only give one fleeting indication that such statements may be allowed.<sup>57</sup> Besides, the above-mentioned Regulation 54(a) empowers the Chamber to rule, among others, on the length and content of legal arguments and the opening and closing statements, which implies that opening statements were envisaged by the ICC framers. On the structure of case presentations and sequencing of the evidentiary stage of trial, Article 64(8)(a) is the farthest to which the state delegations were prepared to go in regulating the order and manner of submitting evidence. But Rule 140 is more specific in setting out the way in which the directions for the conduct of trial are to be given and puts forth some general principles governing the order and manner of witness questioning.<sup>58</sup> It provides, in particular, that the Presiding Judge may give directions under Article 64(8)(b), lacking which the prosecutor and the defence shall agree on the order and manner in which the evidence is to be submitted; where such an agreement not be forthcoming, the Presiding Judge shall issue the directions.<sup>59</sup> Basically, the structure of the case and the phases of ‘trial’ are not explicitly set out and are thus to be established on an *ad hoc* basis. This is remarkable in light of the more determined legislative approach in the predecessor courts.<sup>60</sup> The procedural steps subsequent to the submission of evidence are regulated in more detail. Rule 141 provides for the phase of ‘closure of evidence and closing statements’.<sup>61</sup> At this point, the Presiding Judge declares that the submission of evidence is closed and invites the prosecutor and the defence to make their closing statements, with the defence having the right to speak last.<sup>62</sup>

### (3) *Post-trial:*

Upon the conclusion of the closing stage of the trial hearing, the Trial Chamber may proceed to deliberations on the judgment. Article 74 of the Statute lays down requirements towards deliberations and the Trial Chamber’s judgment. Based on the Statute and Rules, two sub-phases can be discerned: (i) deliberations;<sup>63</sup> and (ii) delivery, pronouncement, and notification of decisions concerning criminal responsibility, sentence, and reparations.<sup>64</sup>

The Statute and Rules present several possible scenarios in terms of how the phase of delivering a trial judgment will be structured, depending on whether a further hearing is held at which the evidence and submissions relevant to sentencing are to be heard. Theoretically, all such evidence could also be submitted along with the evidence relevant to the verdict. So, unless the Court or any of the parties chooses to have a separate sentencing hearing and in case the Court decides to convict,<sup>65</sup> the decision on the sentence may be delivered along with that on the criminal responsibility of the accused. A combined decision—or two discrete consecutive decisions—may be followed, where the Chamber so allows, by representations from and on behalf of the convicted person, victims, other interested persons or States for the purpose of reparation pursuant to Article 75 and, possibly, by a reparation order against the convict or by an order of award of reparations through the Trust Fund.<sup>66</sup> Alternatively, where

<sup>57</sup> Rule 89(1) ICC RPE. See further Chapter 9.

<sup>58</sup> For detailed discussion, see Chapter 10.

<sup>59</sup> Rule 140(1) ICC RPE.

<sup>60</sup> Cf. Art. 24(e) IMT Charter; Rule 85(A) ICTY and ICTR RPE.

<sup>61</sup> See further Chapter 11.

<sup>62</sup> Rule 141(1) and (2) ICC RPE.

<sup>63</sup> Art. 74(1), (3), and (4) ICC Statute; Rule 142 ICC RPE.

<sup>64</sup> Arts 74(5), 75(5), 76 (4) ICC Statute; Rule 144 ICC RPE. The typology of Trial Chamber’s decisions set out in Rule 144 also includes decisions on the admissibility of a case and the jurisdiction of the Court. But, as noted, these challenges would normally have been resolved at the commencement of the trial phase or subsequently, subject to leave under Rule 133, but in any event not after all evidence has been heard.

<sup>65</sup> Art. 76(1) and (2) ICC Statute.

<sup>66</sup> Art. 75(2) ICC Statute (‘The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.’).

either the Trial Chamber or either party so chooses, the Chamber shall order ‘to hold a further hearing to hear any additional evidence or submissions relevant to the sentence’.<sup>67</sup> Should the Court invite representations regarding reparations from or on behalf of the convicted person, victims, or other interested persons or States,<sup>68</sup> any further or additional hearings may also be reserved for hearing such representations.<sup>69</sup>

To sum up, the textual and synthetic reading of the ICC Statute, RPE and Regulations of the Court allows distinguishing five main components of ‘trial’ before the ICC, which are regulated with varying degrees of specificity: (a) commencement of trial; (b) opening statements; (c) submission of evidence; and (d) closure of evidence and closing arguments. These steps are following by the steps which fall within the broader category of ‘trial proceedings’: (d) deliberations; (e) decisions on criminal responsibility and, where appropriate, decisions on sentencing and reparations (the latter decisions possibly and likely preceded by sentencing hearings and further hearings on the representations concerning reparations).

### 2.4 SPSC

In contrast with the schematic outline of trial proceedings in the ICC, the Transitional Rules of Criminal Procedure which governed proceedings in criminal courts of East Timor, including the Special Panels for Serious Crimes in the Dili District Court, were far more specific. The trial layout was set out in Part VI of the TRCP entitled ‘Public Trial’ and located between Parts V (‘Indictment’) and VII (‘Appeals’). Thus the formal distinction between the trial and the pre-trial do not arise.<sup>70</sup> The trial proceedings were comprised of two large phases – the ‘preliminary hearing’ and the trial proper. The purposes of the former hearing were manifold and set out in Section 29.2, which prescribed the Court to:

- (a) satisfy itself that the accused has read or has had the indictment read to him or her and understands the nature of the charges against him or her;
- (b) ensure that the right of the accused to counsel has been respected;
- (c) rule on any motions or requests for evidence or additional investigation, or if the accused has failed to file any motions or requests, ensure that the accused understood his or her rights in that regard;
- (d) afford the accused the opportunity to make a statement concerning the charges, which may include a plea of not guilty or an admission of guilt as to all or any portion of the charges; and
- (e) determine what evidence and witnesses the defence would intend to present to the court.

Section 29.3 envisaged that upon the conclusion of this sequence, the panel of judges or the judge would issue any necessary rulings and, after consultation with the parties, set a date for trial. This marks a formal separation between the preliminary proceedings at trial (analogous to ‘commencement of trial’ at the ICC) and ‘trial’ proper.

The structure of ‘trial’ was governed by Sections 30 (‘Trial Proceedings’), 33 (‘Presentation of Evidence’), 38 (‘Final Statements’), and 39 (‘Decision’). Essentially, it featured four major components. The first step was the opening of trial whereby the panel

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<sup>67</sup> Art. 76(2) ICC Statute (‘Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence’).

<sup>68</sup> Art. 75(3) ICC Statute.

<sup>69</sup> Art. 76(3) ICC Statute (‘any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.’); Rule 143 ICC RPE (‘for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set the date of the further hearing.’).

<sup>70</sup> For an overview of the SPSC pre-trial process, see further Chapter 6.

would: (1) formally open the trial;<sup>71</sup> (2) ‘confirm that the accused has read or has had the indictment read to him or her and understands the nature of the charges, that the right of the accused to counsel has been respected’; and (3) ‘remind the accused of his or her right to remain silent, and shall determine what statements or admissions, if any, the accused will make regarding the crimes alleged’.<sup>72</sup> The second segment of ‘trial’ was the proof-taking stage at which the parties called witnesses and presented evidence under the direction of the panel’s presiding judge. Absent a specific instruction, the evidence was to be presented in this order: (1) statement of the accused, if he or she chooses to make one; (2) evidence for the prosecution; (3) evidence for the defence.<sup>73</sup> The prosecution was then to be given an opportunity to respond to the defence evidence, and the defence in turn allowed to reply, upon which the panel might call any additional witnesses and evidence.<sup>74</sup> The layout of the evidentiary hearing before the SPSC thus followed the adversarial trial scheme, bar the statement by the accused and calling of additional evidence by the court. The avoidance of common law terminology, such as ‘cross-examination’, ‘re-examination’, ‘rebuttal’, and ‘rejoinder’, is interesting from a legal drafting perspective. It seems to follow the comparative-neutral approach as reflected in the ICC legal texts, although this aspect proved to have little bearing on the SPSC practice.<sup>75</sup>

The third component of trial, following the close of evidence, was the stage at which the panel invited the parties to make closing statements. Section 38 established the sequence of statements according to which the prosecution took the floor first and, thereafter, the accused or her or his legal representative were allowed to make a statement. While the defence was the last in addressing the panel, the defendant was not entitled to a ‘last word’ where the final statement had been made by the counsel.<sup>76</sup> The fourth and last segment of trial envisaged in Section 39 was that of deliberation and decision. The panel deliberated in private on a judgment regarding guilt or innocence of the accused which, if the guilt was established, was also to state the qualification and applicable penalty.<sup>77</sup> Besides, the court was authorized to receive additional evidence relevant to the determination of an appropriate penalty, thus allowing the possibility of a separate sentencing phase to be held upon conviction and before the delivery of the trial decision.<sup>78</sup>

Despite that the actual trial practice at the SPSC departed from the ‘law on the books’, the significance of the formal standards to govern the trial adopted for the SPSC goes beyond this—already historical—hybrid jurisdiction. In shaping East Timor’s criminal procedure for the period of transition from the status of an occupied territory to that of a sovereign democratic state, the UNTAET relied on the then newly adopted ICC Statute, which is why the TRCP in many respects reflect the procedural approach embodied in the ICC system. Handed down unilaterally by the Transitional Administrator, the TRCP went beyond incorporating the fundamentals of the ICC system. Those were detailed to the degree impossible for the ICC in view of difficulties in reaching a compromise on key issues of trial procedure in the ICC Statute and RPE. It is a curious fact that, in a sense, the ICC trials came to mirror the structure of trials as established in the TRCP, although they did not serve as a

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<sup>71</sup> Section 30.2 TRCP (‘On the date and time determined in accordance with Section 29.3 of the present regulation, the competent judge shall call upon the parties, shall verify their identities; shall enter such information into the record and shall declare the trial open.’).

<sup>72</sup> Section 30.4 TRCP.

<sup>73</sup> Section 33.1 TRCP.

<sup>74</sup> Section 33.2 TRCP.

<sup>75</sup> See further Chapter 10.

<sup>76</sup> Chapter 11.

<sup>77</sup> Section 39.1 TRCP.

<sup>78</sup> Section 39.2 TRCP (‘If the accused is found guilty, the Court in its discretion may receive additional evidence from the parties before determining the appropriate penalty.’).



direct source of inspiration or guidance for the ICC Trial Chambers in exercising their duties to devise the trial procedure under Article 64(8)(b).<sup>79</sup>

## 2.5 ECCC

Neither the ECCC Law, nor the ECCC Agreement provide for the structure and phases of the ECCC trial proceedings. The ECCC Law contains Chapter X entitled ‘Trial Proceedings of the Extraordinary Chambers’, which, however, states only general principles for the conduct of the proceedings: fairness, expedition and full respect for the rights of the accused and for the protection of victims and witnesses;<sup>80</sup> public and open trials;<sup>81</sup> and the presumption of innocence and minimum guarantees.<sup>82</sup>

The Internal Rules detail these standards and painstakingly set out the composition of the trial phase. Their subsection IV.E (‘Proceedings before the Trial Chamber’) follows subsection IV.D (‘Pre-Trial Chamber Proceedings’) and precedes IV.F dealing with ‘Appeals from the Trial Chamber’. The demarcation between the trial proceedings from the pre-trial and appeals is made along institutional lines.<sup>83</sup> The CIJ and PTC are in charge of the pre-trial proceedings, the Trial Chamber is solely responsible for the trial process, and the Supreme Court Chamber for the appeals. The trial scheme of the ECCC is an outlier and peculiar as compared to other courts. No doubt, this is due to the fact that their IR are rooted in the inquisitorial tradition and to a large extent based on the Cambodian law.<sup>84</sup> This warrants a closer look at the structure of the ECCC process.

For the purpose of determining the point at which the ECCC trial proceedings are considered to formally commence, the crucial moment is the conclusion of the judicial investigation phase and the issuance by the CIJ of a closing order indicting a charged person and sending him or her to trial, or of an order dismissing the case – subject to any PTC decision resulting from the possible appeals against the closing order.<sup>85</sup> Thus, the pre-trial stage is over at the moment when the indictment becomes final. Where no appeal is filed against the closing order and the indictment is issued, CIJ shall seal the case file and, through Greffier, forward it to the Greffier of the Trial Chamber so that it could set for trial, as the next step.<sup>86</sup> In case of an appeal, the Greffier of the CIJ forwards the case file to the Greffier of the PTC as per Rule 77, and the decision on whether the indictment is to be issued lies with that Chamber. The receipt of the case file by the Greffier of the Trial Chamber either from the CIJ or from the PTC signifies the moment when the accused is committed to trial, the Trial Chamber is seized with the case, and trial proceedings formally commence.<sup>87</sup>

The Internal Rules reflect the formal division of ‘Proceedings Before the Trial Chamber’ into: (1) the preparatory phase, or ‘preparation of the trial’ (Rule 80); (2) the ‘trial’ proper, in turn consisting of: (i) the initial hearing (Rules 80*bis*); (ii) the substantive hearing (Rule 89*bis* through 94); and (3) deliberation of the Trial Chamber (Rule 96) and the delivery and announcement of the judgment (Rules 98-102). The following sections will overview this complex structure. As will be shown, the current sub-division results from a string of

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<sup>79</sup> In detail, see Chapter 10.

<sup>80</sup> Art. 33 new ECCC Law. This Article also prescribes that the ECCC shall exercise their jurisdiction in accordance with ‘international standards of justice, fairness and due process of law’ as set in Arts 14 and 15 of the ICCPR. To the same effect, see Art. 12(2) ECCC Agreement.

<sup>81</sup> Art. 34 ECCC Law.

<sup>82</sup> Art. 35 new ECCC Law. See also Art. 13 ECCC Agreement.

<sup>83</sup> On the composition of the ECCC judicial branch, see Arts 3(2), 5, and 7(2) ECCC Agreement; Arts 9 new, 25, 36 new ECCC Law.

<sup>84</sup> See further Chapter 1.

<sup>85</sup> Rules 67(1) ECCC IR. Regarding appeals against closing orders, see Rules 67(5), 73(a) and 74(2)-(4) ECCC IR.

<sup>86</sup> Rule 69(2)(a) ECCC IR.

<sup>87</sup> Rule 79(1) ECCC IR (‘The Trial Chamber shall be seized by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.’).

amendments made in the early period of the ECCC and meant to provide the Chamber with a more detailed regulatory framework and improved case-management tools.

*(1) Preparation of the Trial:*

The double objective of this sub-phase is, first, the effective preparation for trial by the parties and by the Chamber and, secondly, setting the date of the trial.<sup>88</sup> During this phase, the filings by the parties containing the lists of witness and experts they wish to summon at trial are a key mode of the preparation for the trial. Rule 80(1) mandates the Co-Prosecutors to submit to the Greffier of the Chamber their list 15 days from the date the Indictment became final; that list shall be placed by the Greffier on the case file and forward a copy of the list to the parties, subject to any protective measures.<sup>89</sup> Should the accused and/or a consolidated group of civil parties wish to summon any witnesses and experts not on the OCP's list, they shall submit an additional list to the Greffier within 15 days from notification of the first list. It shall too be placed on the case file and the copy thereof shall be distributed, subject to measures needed for witness protection.<sup>90</sup> The requirement for the defence to submit their list of proposed witnesses and experts *before* the trial not only departs from an undiluted 'adversarial' scheme but also goes further than the managerial-court arrangement at the *ad hoc* tribunals where the defence provides such a list before the defence case, i.e. later into the trial.<sup>91</sup>

Rule 80(3), last amended on 17 September 2010, provides for the duty of the parties to make additional filings with view to trial-preparation.<sup>92</sup> The Trial Chamber may order the parties, within a prescribed time limit prior to the initial hearing, to file the following documents: (a) in addition to witness lists: a summary of the facts on which each witness is expected to testify;<sup>93</sup> the points of the indictment to which each witness is expected to testify, including the exact paragraph(s) and the specified counts; and the estimated length of time required for each witness to testify; (b) a list of exhibits they intend to offer in the case, containing a brief description of their nature and contents; (c) an indication of the legal issues, if any, they intend to raise at the initial hearing; (d) a list of new documents which they intend to put before the Chamber with a brief description of their contents and a list of documents already on the case file, appropriately identified; and (e) a list of uncontested facts, together with a reference to the relevant evidence.<sup>94</sup>

The reason to require these extensive filings is to give the Chamber an intimate and comprehensive understanding of the case, including any newly proposed evidence next to the evidence contained in the case file, and to enable it to make decisions as to whether the evidence the parties propose to hear at trial should be allowed. The familiarity with the particulars of witness testimonies and exhibits, their relevance to the paragraphs of the indictment, and the estimated timing for testimony are necessary for the Chamber's mastery of the subject-matter and the effective conduct of the trial. As an 'inquisitorial' court, the Trial Chamber must be equipped to take the leading role in interrogating the accused, questioning

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<sup>88</sup> Rule 80 was not in the initial version of the ECCC IR and was added as part of the series of amendments on 1 February 2008: cf. Rule 80 ECCC IR (12 June 2007), which was renumbered as Rule 81.

<sup>89</sup> The clause on protective measures was added on 5 September 2008. Cf. Rule 80(1) ECCC IR (Rev. 11, February 2008).

<sup>90</sup> Rule 80(2) ECCC IR.

<sup>91</sup> G. Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers', (2008) 6 *JICJ* 129, at 144 (noting that the accused is thereby 'forced to "show his cards"'). On pre-trial filings in the *ad hoc* tribunals, see chapters 6 and 8.

<sup>92</sup> The current Rule 80(3) ECCC IR results from an amendment of 17 September 2010, which transferred the relevant sub-Rule from Rule 79(9) ECCC IR. The latter sub-Rule was added on 5 September 2008. Cf. Rule 79(9) ECCC IR (Rev. 2, 5 September 2008).

<sup>93</sup> Rule 80(3)(a)(i) ECCC IR ('[s]ubject to any protective measures that might be ordered, the summary should be sufficiently detailed to allow the Chamber and the other parties to understand fully the nature and content of the proposed testimony').

<sup>94</sup> Rule 80(3) ECCC IR.

witnesses, experts, and civil parties. Hence, it must not only be apprised of all ins and outs of the case as it may loom from the dossier and the parties' filings, but it is also expected to be in full control of it, both as a case-manager and as the ultimate truth-seeker.

As mentioned, the determination of the date of the trial is another objective of the 'preparation of the trial' stage. Such date is defined by the President of the Trial Chamber, taking into account the appropriate time limits for notification and summons; all parties are entitled to a written notification of the trial date by the Greffier as soon as possible, which is a valid summons.<sup>95</sup> With view to facilitating consultations between the parties and the Chamber on this and other issues that concern the fair and expeditious conduct of the proceedings, the Chamber may convene a 'trial management meeting' which is normally held *in camera* and may be conducted with counsel participating via video-link.<sup>96</sup> The formal purpose of this meeting is 'to allow exchange between the parties to facilitate the setting of the date of the initial or of the substantive hearings and to review the status of the case by allowing the Accused to raise issues in relation thereto, including his or her mental and physical condition'.<sup>97</sup> As a forum for the Chamber to supervise the progress of the preparation of the trial, including policing the timely submission of witness lists and ensuring their completeness, a trial management meeting is comparable with status conferences at the *ad hoc* tribunals.

Finally, in the earliest period of the ECCC, the 'preparation of the trial' was the stage when victims who wished to be joined as civil parties before the Trial Chamber and had not filed a civil party application during investigation, could apply for participation by filing their applications with the Victims Unit.<sup>98</sup> But as result of a comprehensive reform of civil party action carried out in 2009-2010 in order to prepare the procedural framework for the voluminous Case 002, presently all such applications must be filed with the CIJ no later than fifteen days after the notification of the conclusion of the judicial investigation and decided by a separate order at the time of issuing the closing order.<sup>99</sup> Since the Trial Chamber was thereby unburdened of duties related to processing the numerous civil party applications, this measure presumably served to streamline the preparatory phase.

(2) *Trial (i) Initial Hearing:*

Rule 80*bis*(1) states that '[t]he trial begins with an initial hearing', which removes any uncertainty in this regard.<sup>100</sup> The initial version of the ECCC IR referred to this stage as 'the opening of trial', but this terminology disappeared at the first revision.<sup>101</sup> At the second revision round, a sentence was added to the effect that '[the President of the Trial Chamber shall declare the initial hearing open]'.<sup>102</sup> An initial hearing is a venue for the Chamber to consider the lists of potential witnesses and experts submitted by the parties during the 'preparation of the trial' and to decide to grant or to reject the requests to summon those

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<sup>95</sup> Rule 80(5)-(6) ECCC IR.

<sup>96</sup> Rules 80(7) and (8) ECCC IR. This sub-Rule was first introduced as Rule 79(7) ECCC IR (Rev. 2, 5 September 2008).

<sup>97</sup> Rules 80(7) ECCC IR.

<sup>98</sup> This was the status prior to the 11 September 2009 (Rev. 4) amendments: cf. Rule 23(4) ECCC IR (Rev. 3, 6 March 2009) ('To be admissible, civil party applications must be filed within the Victims Unit at least 10 (ten) working days before the initial hearing'). The earlier version of the same Rule, prior to ECCC IR (Rev. 2, 5 September 2008) authorized victims to apply until the opening of the proceedings before the Trial Chamber. By comparison, the original Rules 23(3) and 82(1) ECCC IR as adopted on 12 June 2007 envisaged that such applications should be filed until the opening of the proceedings before the Trial Chamber and considered '[a]t the opening of the trial'.

<sup>99</sup> Rule 23*bis*(2) ECCC IR.

<sup>100</sup> Rule 80*bis* ECCC IR was adopted on 1 February 2008 (Rev. 1) and amended three times since (last amendment dated 17 September 2010).

<sup>101</sup> Cf. Rules 82(1) and 83(1) ECCC IR (12 June 2007).

<sup>102</sup> Rule 80*bis* ECCC IR (Rev. 2, 5 September 2008).

proposed witnesses, based on whether hearing them is ‘conducive to the good administration of justice’.<sup>103</sup>

Notably, in the original version of the IR, the precursor of this standard in Rule 83(1) contemplated the possibility of summoning a proposed witness or expert for the accused or the civil parties ‘at the expense of the requesting party’ as an alternative to rejecting the request, i.e. where the Chamber deemed that the hearing of the witness or expert would not be conducive to the ‘good administration of justice’. The accused had always had the ‘absolute right to summon witnesses against him or her’ whom he or she ‘had no opportunity to examine in the pre-trial stage’, at the ECCC’s expense.<sup>104</sup> Presumably, the rationale behind the requirement that a party must pay the expenses of summoning a witness was to dissuade them from making arbitrary requests where the proposed testimony would not be conducive to the ascertainment of truth. It is not difficult to see that such a rule is unfair—as the Co-Prosecutors were not subject to it—and flawed for other reasons. As a matter of judicial economy and expeditious proceedings, shifting the financial burden associated with a summons to the requesting party does not justify calling the witness if her testimony is irrelevant or superfluous; moreover, this gives rise to an apprehension of pre-judgement about the probative value of the evidence on the part of the Chamber, since it has already decided that the prospective appearance of the witness is not in the interests of justice. So it is fortunate that this provision was amended at the first revision of 1 February 2008.

The second rationale of the initial hearing is that the Chamber shall consider matters dealt with in Rule 89, i.e. preliminary objections.<sup>105</sup> At present, such objections must be raised no later than thirty days after the closing order becomes final, failing which will lead to inadmissibility.<sup>106</sup> Preliminary objections are those concerning the jurisdiction of the Chamber, any issue requiring the termination of the prosecution, and nullity of procedural acts made after the filing of the indictment. At all times, other parties shall be allowed to respond to the objection, while the reasoned decision thereon may be issued either immediately or at the same time as the judgement on the merits; the proceedings shall continue unless the immediate decision is made to terminate the proceedings.<sup>107</sup> Finally, the initial hearing is an appropriate stage for raising objections against the procedural regularity of a summons – because if raised after the questioning of the accused on the merits has started, such objections are inadmissible.<sup>108</sup>

*(2) Trial (ii) Substantive hearing:*

Rule 89*bis*, which was adopted on 5 September 2008, formally instituted the ‘substantive hearing’ as a distinct component within the structure of ‘trial’ before ECCC. Or, rather, it merely affixed this label to the procedural interval between the ‘opening of trial’ and closing statements that had hitherto been unspecified in the Rules. In line with the addition of the ‘initial hearing’, this reflected a move towards a more formalistic and systematic approach in regulating the trial process. The steps comprised within the ‘substantive hearing’ include the opening statements by the Co-Prosecutors and the defence,<sup>109</sup> questioning of the accused,<sup>110</sup> and hearing of civil parties, witnesses, and experts,<sup>111</sup> and closing statements.<sup>112</sup> Besides, the

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<sup>103</sup> Rule 80*bis*(2) ECCC IR.

<sup>104</sup> Rule 84(1) ECCC IR. Cf. Rule 83(2) ECCC IR (12 June 2007) and Rule 84(1) ECCC IR (Rev. 2, 5 September 2008).

<sup>105</sup> Rule 80*bis*(3) ECCC IR.

<sup>106</sup> Rule 89(1) ECCC IR (Rev. 4, 11 September 2009). Prior to 11 September 2009, preliminary objections could only be raised at the initial hearing itself: cf. Rule 89(1) ECCC IR (Rev. 3, 6 March 2009).

<sup>107</sup> Rule 89(2) and (3) ECCC IR.

<sup>108</sup> Rule 88(3) ECCC IR.

<sup>109</sup> Rule 89*bis*(2) ECCC IR; cf. Rule 88(4) ECCC IR (Rev. 1, 1 February 2008).

<sup>110</sup> Rule 90 ECCC IR.

<sup>111</sup> Rule 91 ECCC IR.

<sup>112</sup> Rule 94 ECCC IR.

Rules envisage extemporal or optional procedural activities, including the consideration of written submissions the parties may make up until closing statements<sup>113</sup> and any additional investigations that may be ordered by the Chamber.<sup>114</sup> Thus, the term encompasses and conveniently describes the core phase of the ECCC trial process, being the hearing of the parties' submissions and the examination of evidence.

By analogy with the procedure at the initial hearing, the substantive hearing is considered formally open with a respective announcement by the President, who then orders the Greffier to read the counts against the accused and possibly the factual analysis in the indictment.<sup>115</sup> These preliminary steps were not part of the ECCC procedure from the outset and were added at the second revision round in September 2008.<sup>116</sup> Next, before the questioning of the accused starts, the Co-Prosecutors may make a brief opening statement of the charges to which the accused or his or her lawyers may respond briefly.<sup>117</sup> While the opening stage will be discussed in a due course, it is worth noting that opening statements may only be delivered by the OCP and by the defence; the omission of civil parties implies that this mode of participation is not available to them, unlike is the case with the victims before the ICC.<sup>118</sup>

After opening speeches, the President shall inform the accused of the rights under Rule 21(1)(d), including the right to remain silent,<sup>119</sup> and proceed to questioning him or her. The fact that the accused is questioned first reflects the 'inquisitorial' epistemic approach. The accused is seen and treated exclusively as a party but this does not preclude him or her from being an important source of evidence. One early commentary suggested that the rationale for the questioning of the accused is that 'the judges want, after all, [to] hear what he personally has to say (if anything) after the *exposé* by the Co-Prosecutors.'<sup>120</sup> In practice, however, the accused is interrogated on specific topics and issues relating to the merits of the case, as any personal reaction to the charges will have been received during opening statements. In line with the tenets of the 'inquisitorial' process, the accused is questioned in his or her own capacity, i.e. neither as a witness who is to make a solemn declaration pursuant to Rule 24(1),<sup>121</sup> nor as one relieved from this requirement.<sup>122</sup> His or her answers are not strictly 'testimony', but a *sui generis* kind of evidence that is admissible due to the liberal evidentiary regime and that may be accorded probative value by the court.<sup>123</sup> This removes the dilemma that the accused in the adversarial trial setup face of having to choose either to testify as a witness bound by a legal duty to tell the truth or be liable for perjury, or to remain silent throughout the trial.<sup>124</sup> Like in any 'inquisitorial' court, the Trial Chamber judges are under

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<sup>113</sup> Rule 92 ECCC IR.

<sup>114</sup> Rule 93 ECCC IR.

<sup>115</sup> Rule 89*bis*(1) ECCC IR.

<sup>116</sup> See Rule 89*bis*(1) ECCC IR (Rev. 2, 5 September 2008).

<sup>117</sup> Rule 89*bis*(2) ECCC IR.

<sup>118</sup> In detail, see Chapter 9.

<sup>119</sup> Rule 21(1)(d) ECCC IR guarantees the presumption of innocence and the right of every suspected or prosecuted person to be informed of any charges against him or her, to be defended by a lawyer of his or her choice, and to be informed, at any stage of proceedings, of the right to remain silent.

<sup>120</sup> Acquaviva, 'New Paths' (n 90), at 147.

<sup>121</sup> Rule 24(1) ECCC IR ('Before ... testifying before the Chambers, witnesses shall take an oath or affirmation in accordance with their religion or beliefs to state the truth.') Cf. Acquaviva, 'New Paths' (n 90), at 147 ('no Rule explicitly provides for a solemn declaration by witnesses before the ECCC').

<sup>122</sup> Rule 24(2) ECCC IR (witnesses who may testify without having taken an oath: a) The father, mother and ascendants of the Charged Person, Accused or Civil Party; b) The sons, daughters and descendants of the Charged Person, Accused or Civil Party; c) The brothers and sisters of the Charged Person, Accused or Civil Party; d) The brother-in-laws and sister-in-laws of the Charged Person, Accused or Civil Party; e) The husband or wife of the Charged Person, Accused or Civil Party, even if they have been divorced; and f) Any child who is less than 14 (fourteen) years old).

<sup>123</sup> Rule 87(1) ('Unless provided otherwise in these IRs, all evidence is admissible.').

<sup>124</sup> Acquaviva, 'New Paths' (n 90), at 147.

the ‘duty to raise all pertinent questions, whether these would tend to prove or disprove the guilt of the Accused’.<sup>125</sup> Upon the judicial questioning, the Co-Prosecutors and other parties take over. They may ask questions ‘with the permission of the President’ and, except for the questions of the Co-Prosecutors and the lawyers, all questions shall be asked ‘through the President of the Court’.<sup>126</sup> This order of questioning is subject to the adjustment, as Rule 91*bis*, which was added in September 2010, mandates the President of the Trial Chamber to ‘determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties’.<sup>127</sup> As will be detailed in Chapter 10, the Trial Chamber has used this power in respect of some witnesses in practice.<sup>128</sup>

Upon conclusion of the interrogation of the accused, ‘[t]he Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful’.<sup>129</sup> The hearing of these participants is subject to slightly different regulations than those relevant to the interrogation of the accused, although their practical relevance may be limited. First, the duty on the judges to ask ‘all pertinent questions’ is not expressly established but may nevertheless be implied, given that the judges ‘may ask any questions’.<sup>130</sup> Secondly, all the parties and their lawyers may move the Chamber to discontinue the hearing of the testimony of any witness if they deem it not to be conducive to the ascertaining the truth, which is to be decided by the President.<sup>131</sup>

In contrast with the structure of trial before the *ad hoc* tribunals, the ECCC IR are flexible when it comes to the sequence of hearing evidence (save for the precedence of the interrogation of the accused) and are not concerned with the order of blocks of evidence, which is typical for an inquisitorial setting.<sup>132</sup> The substantive hearing is organized around one case as it emerges from the case file and from any additionally admitted evidence, and that case must be probed by the court with the assistance of the parties. There is no division into several consecutive cases or evidence-blocks per party and the proceedings are organized per theme. Hence, the full sequence of questioning of accused and hearing any witnesses, civil parties or experts where they can clarify matters for the court is repeated for each topic. The President has the power to tightly control the conduct of questioning by permitting or disallowing questions proposed by the parties – and can indeed be expected to be capable of effectively shaping and directing the inquiry into facts, given the intimate familiarity with the case.<sup>133</sup>

The Trial Chamber’s capacity as an active fact-finder and ‘objective truth’ seeker culminates in its mandate to order additional investigations, whenever deemed necessary.<sup>134</sup> This by far surpasses the analogous powers of the judges in other courts.<sup>135</sup> In ‘adversarial’

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<sup>125</sup> Rule 90(1) ECCC IR.

<sup>126</sup> Rule 90(2) ECCC IR.

<sup>127</sup> Rule 91*bis* (Rev. 6, 17 September 2010).

<sup>128</sup> Chapter 10, section 3.5.2

<sup>129</sup> Rule 91(1) ECCC IR.

<sup>130</sup> Rule 91(2) ECCC IR. This sub-Rule also provides that ‘all the other parties and their lawyers shall also be allowed to ask questions with the permission of the President. Except for questions asked by the Judges, the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber’

<sup>131</sup> Rule 91(3) ECCC IR.

<sup>132</sup> See also Acquaviva, ‘New Paths’ (n 90), at 148.

<sup>133</sup> Acquaviva, ‘New Paths’ (n 90), at 143-4 (‘the underlying assumption of trial proceedings before the ECCC is a very tight control by the trial judges of what is meant to happen in the courtroom’).

<sup>134</sup> Rule 93(2) ECCC IR (providing for power of the TC to: (a) go anywhere within the territorial jurisdiction of the ECCC; (b) interview witnesses; (c) conduct searches; (d) seize any evidence; and (e) order expert opinions).

<sup>135</sup> Cf. Rule 98 ICTY, ICTR, and SCSL RPE (‘A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.’); Art. 64(6)(d) ICC Statute (‘In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: ... [o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.’).

settings, judges content themselves with the evidence put before them, whereas the prosecution's failure to satisfy them 'beyond reasonable doubt' of the guilt of the accused results in acquittal. However, the ECCC Trial Chamber is not limited to the evidence proposed by the parties and may search for additional proof regardless of whether it can be expected to go to the guilt or innocence of the accused. To the extent that an additional investigation may result in new incriminating evidence, there is arguably a systemic incongruence with the adversarial-style rules such as the placement of the onus of proof squarely on the Co-Prosecutors and the adoption to the standard of 'beyond reasonable doubt' rather than 'intimate conviction' on the part of the trial judges.<sup>136</sup>

Finally, once all evidence material to the judgement regarding the verdict, sentence and reparations has been examined, the closing stage of the substantive hearing begins.<sup>137</sup> To that end, the President calls upon the parties to deliver their closing statements, in the following sequence: a) Civil Party Lead Co-Lawyers,<sup>138</sup> b) the Co-Prosecutors, for such oral submissions as they consider necessary for justice to be done; c) the lawyers for the Accused; and d) the Accused.<sup>139</sup> Notably, the accused is entitled to make a personal statement independent from the closing statement of Co-Lawyers, which is akin to the 'last word' arrangement at Nuremberg.<sup>140</sup> The Civil Parties may not deliver closing statements in person, but only through Lead Co-Lawyers. With view to a structured debate on evidence, the ECCC IR also envisage the possibility for the Co-Prosecutors and Civil Party Lead Co-Lawyers to deliver rebuttal statements in reaction to the defence closing speeches, but the accused and the Co-Lawyers 'shall always be entitled to make a final statement'.<sup>141</sup>

*(3) Deliberation and judgment:*

Upon the conclusion of the substantive hearing, the Trial Chamber retreats for deliberation *in camera*; given the mixed character of the trial bench, the presence of interpreters is specifically allowed to enable the consultations.<sup>142</sup> No further applications or submissions can be filed with the Chamber after that point, although the judges may reopen the proceedings.<sup>143</sup> This may supposedly occur where there is a material change in circumstances or where the evidence, despite the effort to summon all witnesses at trial, turns out to be incomplete for the purpose reaching a verdict and in want of additional investigations. The possibility of interrupting deliberations is remarkable because no other tribunal is availed of such a power. The ECCC IR further limits the scope of the judgment—and thereby of the deliberation—to the facts set out in the indictment and, self-evidently, to the question of criminal responsibility of the accused, as opposed any other individuals.<sup>144</sup> The process of deliberation is also governed by the principle of consensus-oriented decision-making and the voting requirement of 'supermajority'.<sup>145</sup> Thus, 'the Chamber shall attempt to achieve unanimity', but it will enter a conviction where the affirmative vote of at least four judges has been cast, failing which the acquittal ensues.<sup>146</sup>

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<sup>136</sup> 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.').

<sup>137</sup> In detail, see Chapter 11.

<sup>138</sup> As amended on 17 September 2010 (Rev. 6). Cf. Rule 94(1) ECCC IR (Rev. 2, 5 September 2008) ('the lawyers for Civil Parties'); Rule 94(1) ECCC IR (Rev. 3, 6 March 2009) ('the Civil Parties').

<sup>139</sup> Rule 94(1) ECCC IR.

<sup>140</sup> *Supra* 2.1.

<sup>141</sup> Rule 94(2) and (3) ECCC IR.

<sup>142</sup> Rule 96(1) ECCC IR.

<sup>143</sup> Rule 96(2) ECCC IR. The power of the TC to reopen proceedings was added on 1 February 2008 (Rev. 1).

<sup>144</sup> Rule 98(2) ECCC IR.

<sup>145</sup> Art. 14 new (1) ECCC Law. See also Art. 3(2) ECCC Agreement and Art. 9 new ECCC Law (the TC is composed of three Cambodian judges with one acting as the President and two international judges).

<sup>146</sup> Rule 98(4) ECCC IR.

## Chapter 7: Defining the Trial Stage

Upon the conclusion of deliberations, a single judgement regarding criminal responsibility of the accused and, where appropriate, regarding the sentence and civil claims shall be rendered and pronounced. The scope, effects, and the form of the judgment are regulated in detail.<sup>147</sup> The Chamber shall acquit if the acts set out in the indictment have not been proven or convict and sentence the accused where the guilt has been proven; the Chamber may also decide that the ECCC does not have jurisdiction over the crimes set out in the indictment.<sup>148</sup> The decision on civil claims forms an integral part of the judgment on criminal action in the same case and shall not be in contradiction with it.<sup>149</sup> Notably, the previous versions of the ECCC IR established deadlines for the pronouncement of the judgment, but this provision was eventually removed and Rule 98(1) merely states that where the judgment is not pronounced during the final hearing, the President shall notify the parties of the expected date.<sup>150</sup> Separate and dissenting opinions are allowed and, if any, shall be attached to the judgment.<sup>151</sup> The trial stage is concluded with the pronouncement of the judgment at a public hearing through reading of the judgment summary and any separate or dissenting opinions.<sup>152</sup> The copy of the judgment is provided by the Greffier to the parties and forwarded for publication by the Office of Administration; in case the accused is absent from the hearing, he or she is notified of the judgment through the lawyer.<sup>153</sup> Notification marks the end of the trial process and the moment from which the period of appeal starts running.

### 2.6 STL

The STL Agreement does not address the issues of delimitation between the procedural stages and the structure of trial proceedings directly. But the institutional structure of the STL and the distribution of judicial power allow separating between the pre-trial, trial, and appellate adjudicative functions, which are attributed respectively to the PTJ, Trial Chamber, and the Appeals Chamber.<sup>154</sup> This is also reflected on the provisions concerning the composition of the Chambers,<sup>155</sup> insofar as it implies that various judicial functions may not be combined in one person. While the pre-trial (or designated) judges at the ICTY, ICTR, and SCSL are ordinarily the members of the Trial Chamber trying the case,<sup>156</sup> ‘the pre-trial judge of the special tribunal for Lebanon is a dedicated, single international judge serving as a pre-trial judge only and not as a member of any of the chambers.’<sup>157</sup> The division of judicial tasks is

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<sup>147</sup> See Rules 98-101 ECCC IR. See in particular Rule 101(3)-(7) ECCC IR (establishing material and formal requirements towards the judgment).

<sup>148</sup> Rule 98(5)-(7) ECCC IR.

<sup>149</sup> Rule 100 ECCC IR. This Rule also authorized the TC to adjourn its decision on civil party claims to a new hearing.

<sup>150</sup> Cf. Rule 98(1) ECCC IR (12 June 2007) (providing that the judgment shall be pronounced within 30 days); rule 98(1) ECCC IR (Rev. 1, 1 February 2008) (extending that period to 90 days and envisaging the possibility of further extending it).

<sup>151</sup> Rule 101(2) ECCC IR.

<sup>152</sup> Rule 102(1) ECCC IR.

<sup>153</sup> Rule 102(2) ECCC IR.

<sup>154</sup> Art. 2(2) STL Agreement (‘The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.’).

<sup>155</sup> Art. 2(3) STL Agreement; Arts 7 and 8(1) STL Statute. The composition of the Chambers is as follows: one international PTJ; three judges in the TC, of whom one shall be Lebanese and two international; five judges in the AC, of whom two shall be Lebanese and three international; and two alternate judges, one Lebanese and another international. This establishes the predominance of foreign judges in the STL, in contrast with the ECCC.

<sup>156</sup> See Chapter 6.

<sup>157</sup> Report of the Secretary General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006 (‘UNSG Report on STL Statute’), para. 28. See also STL Rules of Procedure and Evidence



faithfully implemented in the Statute. As examined elsewhere, the PTJ is exclusively responsible for the conduct of ‘pre-trial proceedings’;<sup>158</sup> ‘trial proceedings’ are within the competence of the Trial Chamber;<sup>159</sup> and the appeal process within that of the Appeals Chamber.<sup>160</sup>

A schematic outline of the trial process is provided in Article 20, entitled identically to Article 20 of the ICTY Statute (‘Commencement and conduct of trial proceedings’). Article 20(1) starts by reproducing the language of Article 20(3) of the ICTY Statute in prescribing the Chamber to read the indictment to the accused, to satisfy itself that the rights of the accused are respected, to confirm that the accused understands the indictment, and to instruct the accused to enter a plea. These steps mark the ‘commencement of trial proceedings’. However, Article 20(1) of the STL Statute omits the second sentence of the ICTY provision mandating the Chamber to set the date for trial upon instructing the accused to enter a plea, on the basis of which one could draw a distinction between ‘trial proceedings’ and ‘trial’ in the narrow sense.<sup>161</sup> Article 20(3) does support this distinction insofar as it establishes that the Trial Chamber upon request or *proprio motu* may decide to call additional witnesses and/or order the production of additional evidence *at any stage of trial*. The combined reading of Article 20(1) and (3) suggests that ‘trial’ may not encompass activities falling within the ‘commencement of trial’ because calling witnesses, let alone additional ones, or ordering the production of evidence at that preliminary stage is neither appropriate nor necessary.

Similarly with the ICTY and ICTR legal regimes, the STL Rules obscure somewhat the statutory demarcation between the pre-trial and trial proceedings. While the appeals are governed by Part Seven whose scope of regulation corresponds to that of Article 26 of the Statute, Parts Five (‘Confirmation of Charges and Pre-Trial Proceedings’) and Six (‘Proceedings before the Trial Chamber’) of the STL RPE draw the distinction between the pre-trial and trial stages differently. The ‘pre-trial proceedings’ under the Rules are not confined to the activities undertaken the PTJ but also include preparatory functions exercised by the Trial Chamber, although the Statute allocates them in the rubric of ‘trial proceedings’. It follows from the structure of the STL RPE that the transfer of a case file from the PTJ to the Trial Chamber pursuant to Rule 95 does not denote the formal end of the ‘pre-trial proceedings’. The proceedings subsequent to the PTJ’s activities are composed of ‘preliminary proceedings’ (which include the initial and further appearances of the accused<sup>162</sup> and plea agreements and guilty pleas);<sup>163</sup> disclosure;<sup>164</sup> and pre-trial and pre-defence conferences.<sup>165</sup> These steps are covered by Part Five governing pre-trial proceedings, as opposed to Part Six (‘Proceedings before the Trial Chamber’). The textual and contextual reading of the Rules suggests that these steps and intervening or contemporaneous judicial activities are deemed part and parcel of pre-trial process,<sup>166</sup> although Article 20 refers to them as the ‘commencement of trial proceedings’. The title of Part Six adds to the terminological confusion by adopting the formula used in the ICTY and ICTR Rules which refers to the

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(as of 12 April 2012) – Explanatory Memorandum by the STL’s President (‘STL RPE Explanatory Memorandum’), paras 11-14.

<sup>158</sup> Chapter 6.

<sup>159</sup> Art. 20 STL Statute.

<sup>160</sup> Art. 26 STL Statute.

<sup>161</sup> *Supra* 2.2. Presumably, the drafters of the STL Statute wished to remedy the uncertainty of Art. 20(3) ICTY Statute and Art. 19(3) ICTR Statute which could lead to the (erroneous) interpretation that the TC is to set the date for trial even where the accused pleads guilty. Rule 98(A)(v) STL RPE concerning initial and further appearances makes clear that a date for trial shall be set only in case of a plea of not guilty.

<sup>162</sup> Rule 98(A)(iv) STL RPE.

<sup>163</sup> Rules 99-100 STL RPE.

<sup>164</sup> Rules 110-121 STL RPE.

<sup>165</sup> Rule 127 STL RPE.

<sup>166</sup> See e.g. Rules 91(A), 96, and 105*bis*(B) STL RPE (explicitly referring to the various steps as being part of ‘pre-trial proceedings’).

‘proceedings before the Trial Chamber’ rather than ‘trial proceedings’ or ‘trial’, although the proceedings covered by the previous Part take place before that Chamber as well.<sup>167</sup> Next to ‘proceedings before the Trial Chamber’, the Rules employ the notions ‘trial proceedings’ and ‘trial’/‘trial stage’ and sometimes use them interchangeably, although more consistency has been introduced by rule amendments.<sup>168</sup> On occasions, the Rules do give ‘trial’ a narrow interpretation as standing for case presentation.<sup>169</sup> Thus, even though the starting moment of ‘trial’ is not clearly defined by the STL framework, it can be inferred that the notion of ‘trial’ does not encompass the interval from initial and further appearances until the parties’ opening statements.

The structure of ‘trial’ as set out in Part Six of the STL Rules draws upon that of trials before the ICTY and ICTR, being a familiar sequence of phases: (i) opening statements (Rule 143); (ii) presentation of evidence (Rule 146), with the possibility of entering a judgment of acquittal on some or all counts after the close of the prosecution evidence (Rule 167); and (iii) closing arguments (Rule 147). The ‘post-trial’ process that follows upon the conclusion of the hearing of the case on the merits—deliberations (Rule 148), judgment (Rule 168), and sentencing procedure (Rule 171)—does form part of broader ‘trial proceedings’ but not of ‘trial’ or ‘trial stage’ in the narrow sense.<sup>170</sup> Due to the procedural and institutional innovations of the STL regime, the sub-division into distinct phases of trial before the STL presents nuances which deserve pausing upon.

Essentially, most of the key differences between the STL trial procedure and the *ad hoc* tribunals’ process flow from the incorporation of civil-law inspired elements in the ‘essentially adversarial’ setting of the STL.<sup>171</sup> First, Article 17 of the Statute is modeled on Article 68(3) of the ICC Statute and allows victims to participate in the proceedings in their own capacity, as opposed to witnesses alone as is the case with the ICTY, ICTR and SCSL or *parties civiles* under the Lebanese system.<sup>172</sup> The implications of the victim participation scheme are manifold and substantial as it affects all phases of trial. Next to the possibility for the participating victims to testify if allowed by the Trial Chamber,<sup>173</sup> victims have the right to make opening statements,<sup>174</sup> to request the Chamber to allow them to call evidence and rebuttal evidence<sup>175</sup> and to ask specific questions to the accused through a legal representative,<sup>176</sup> to examine and cross-examine witnesses,<sup>177</sup> to make closing arguments and to file final briefs,<sup>178</sup> and to be heard at the sentencing stage.<sup>179</sup> As victims are reserved a distinct slot in every round of opening and closing interventions and evidentiary presentations,

<sup>167</sup> See also *supra* 2.2.

<sup>168</sup> Cf. Rules 71(F) and 91(C) STL RPE (‘the date for trial’ v. ‘the date for trial proceedings’). In the previous versions of the STL RPE, the use of this terminology was more haphazard. See e.g. Rules 103 and 104 STL RPE (STL/BD/2009/01/Rev. 1, 5 June 2009) (the title of Rule 103 referred to ‘attendance at trial’, but sub-Rule 103(A) to ‘trial proceedings’; the title of Rule 104 referred to ‘trial proceedings’, whereas the text to ‘trial’).

<sup>169</sup> E.g. Rule 98(A)(v) STL RPE.

<sup>170</sup> See e.g. Rule 87(B) and (C) STL RPE (distinguishing between the ‘trial stage’ and ‘sentencing stage’ for the purpose of victim participation).

<sup>171</sup> UNSG Report on STL Statute (n 157), para. 32.

<sup>172</sup> *Ibid.* (on the absence of ‘distinctive features of civil law’ such as the investigating judge and ‘the participation of victims as “*parties civiles*”’); STL RPE Explanatory Memorandum (n 157), paras 15-7 (in providing for the modes of victim participation, the STL RPE draw upon the Lebanese Code of Criminal Procedure bar the elements pertinent to the civil party action).

<sup>173</sup> Rule 150(C) STL RPE (‘A victim participating in the proceedings may be permitted to give evidence if a Chamber decides that the interests of justice so require.’). This possibility was introduced by the 8 February 2012 amendment.

<sup>174</sup> Rule 143 STL RPE.

<sup>175</sup> Rules 87(B) and 146(A) and (B)(ii) and (v) STL RPE.

<sup>176</sup> Rule 144(B) STL RPE.

<sup>177</sup> Rule 87(B) STL RPE.

<sup>178</sup> Rule 147(A) and (B) STL RPE.

<sup>179</sup> Rules 87(C) and 171(B) STL RPE.

victim participation at the STL is likely to have a substantial impact on the actual structure of trial proceedings.

Secondly, the defendant may not only appear as a witness in his own defence but also make statements to the Trial Chamber at *any* stage of the proceedings, provided that they are relevant to the case.<sup>180</sup> Like in the ICC context, the right of the accused to make statements is not limited to the opening stage.<sup>181</sup> Subject to the notice of the right to silence and the prohibition to draw adverse inferences from the exercise of this right, the judges may pose questions to the accused at any stage *proprio motu* or at the request of a party or a victim's legal representative.<sup>182</sup> The statements or answers given by the accused in the course of judicial questioning need not be preceded by a solemn declaration, although the accused may elect to make it, and their probative value, if any, shall be determined by the judges.<sup>183</sup> The opportunity for the accused to be heard and to be questioned throughout the trial, whether sworn in or not, allows the judges to have a direct contact with the accused, next to his possible testimony as a defence witness. This grants the accused who wishes to participate other than as a witness a more active role at trial, rather than being a mere 'object' of the proceedings. The 'right to be heard' draws upon the 'inquisitorial' notion that the accused is a party irreducible to the role of a witness.<sup>184</sup>

The third crucial point which strengthens the 'inquisitorial' inclination of the STL trial procedure, is that Article 20(2) of the Statute envisages the default order of questioning of witnesses as commencing with questions posed by the Presiding Judge, followed by the questions posed by other trial judges, and then queries from the prosecution and the defence.<sup>185</sup> This sequence departs from the order of witness questioning at the ICTY, ICTR and SCSL and is akin to that typically followed at the ECCC. The judges, rather than parties, are given the leading role at the evidentiary phase.<sup>186</sup> Rule 145 details that statutory provision and specifies that in deciding on whether the Presiding Judge should start questioning the witness, the Chamber is to be satisfied that the file submitted by the PTJ enables it to proceed in this manner. If it is so satisfied, following the questions by the Presiding Judge and any other trial judge, the witness will be questioned by the calling party, may be cross-examined by the other party and re-examined by the calling party.<sup>187</sup> Where the case file submitted by the PTJ does not warrant this sequence because it is less than exhaustive, the ICTY scheme will be relied upon instead: the Presiding Judge and other members of the Chamber defer questioning to the parties and retain the right to pose their questions at any time.<sup>188</sup> Both options may be altered in the interests of justice.<sup>189</sup> In principle, the case file that is to be transferred by the PTJ to the Trial Chamber may be sufficiently comprehensive to enable the trial judges to lead the witness interrogation, given the exacting requirements of Rule 95(A).

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<sup>180</sup> Rule 144(A) and (D) STL RPE. See also Art. 16(5) STL Statute ('The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.').

<sup>181</sup> Cf. Rule 84*bis* ICTY RPE. The ICTY occasionally gave this provision a broad interpretation, as the 'right to be heard' throughout the trial and therefore allowing the accused to make statements after the opening phase. See Chapter 9.

<sup>182</sup> Rule 144(B) STL RPE.

<sup>183</sup> Rule 144(C) STL RPE. See also STL RPE Explanatory Memorandum (n 157), para. 31 ('the accused's answers have the same evidentiary value as the evidence of other witnesses - that is, they are not to be considered as having lesser value than if he goes into the witness box and gives sworn evidence.').

<sup>184</sup> STL RPE Explanatory Memorandum (n 157), para. 31 (Art. 16(5) 'grants an accused a role typically found in inquisitorial systems. The RPE follow this pattern').

<sup>185</sup> *Ibid.*, para. 26 ('a mode of hearing witnesses along the lines of inquisitorial systems').

<sup>186</sup> Report of the Secretary General on the establishment of a special tribunal for Lebanon (n 156), para. 32(a).

<sup>187</sup> Rule 145(A) STL RPE.

<sup>188</sup> Rule 145(B) STL RPE. See also STL RPE Explanatory Memorandum (n 157), para. 29 (referring to this as 'a return to the adversarial mode of conduct').

<sup>189</sup> Art. 20(2) STL Statute; Rule 145(C) STL RPE.

But it remains to be seen whether the predominance of judges at the case presentation stage will prove viable in practice.<sup>190</sup>

Fourthly, the ‘inquisitorial’ element of the procedure, which puts the STL apart from other tribunals, save for the Nuremberg precedent,<sup>191</sup> is the possibility to hold, in exceptional circumstances and under strict conditions, trials *in absentia*.<sup>192</sup> Trials *in absentia* are not in violation of the human rights standards *per se* and are in keeping with practice adopted in some, albeit not all, civil-law jurisdictions.<sup>193</sup> The allowance of *in absentia* proceedings in the STL Statute was related to the anticipated difficulties in acquiring custody over accused in the political realities accompanying the establishment of the STL.<sup>194</sup> The STL *in absentia* scheme provides the accused with a number of guarantees meant to remove prejudice that may arise from proceedings conducted in his absence, including retrial in case of appearance. Where the accused appears during the course of an ongoing *in absentia* trial, the proceedings *ex novo* will be ordered, unless the accused waives the right to restart the trial or, subject to the consent of the defence, the court may decide to utilize part of the *in absentia* proceedings in the new proceedings.<sup>195</sup> The accused who appears after the conclusion of *in absentia* proceedings may also request a retrial or accept a judgment and request a new hearing with respect of sentence, among others.<sup>196</sup> Be it as it may, the ordinary rules governing the trial procedure apply *mutatis mutandis* to trials *in absentia*.<sup>197</sup> A decision of the Trial Chamber to hold such a trial in a specific case<sup>198</sup> neither affects the structure of the proceedings nor results in the side-stepping of any of its stages.

The separate sentencing stage is the final feature of the STL trial process that is worth noting here. The STL sentencing process is an outlier amongst the civil-law ingredients discussed above and is more in line with the common-law approach. In contrast to the uniform trial scheme for uncontested trials adopted by the ICTY and ICTR in 1998, the STL Rules embody the bifurcation between the guilt-determination stage and the judgment, on the one hand, and the sentencing procedure and judgment, on the other hand.<sup>199</sup> The parties will defer their submissions and relevant information which may assist the Chamber in the determination of the appropriate sentence until after the accused has been convicted and

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<sup>190</sup> Acquaviva, ‘New Paths’ (n 90), at 148 (noting that the STL judges may to a lesser extent be prepared to lead the examination of witnesses because of their lack of access to the results of investigations).

<sup>191</sup> Art. 12 IMT Charter. See further W.A. Schabas, ‘*In Absentia* Proceedings before International Criminal Courts’, in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009) 328-34.

<sup>192</sup> Art. 22(1) STL Statute allows for the proceedings in the absence of the accused, if he or she: (a) has expressly and in writing waived the right to present; (b) has not been handed over to the Tribunal by the State authorities concerned; and (c) has absconded or otherwise cannot be found, whereas all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the PTJ. Art. 22(3) provides that the accused shall have the right to be retried in case of conviction *in absentia* if he or she had not designated a defence counsel of his or her choosing.

<sup>193</sup> STL RPE Explanatory Memorandum (n 157), paras 38-40 (observing that trials *in absentia* are admissible in Italy, Belgium, and Lebanon but not in Germany and Italy).

<sup>194</sup> UNSG Report on STL Statute (n 157), para. 32 (‘in the present case, where the conduct of joint trials for some or all of the cases falling within the jurisdiction of the tribunal is likely, it would be crucial to ensure that the legal process is not unduly or indefinitely delayed because of the absence of some accused.’). See also C. Aptel, ‘Some Innovations in the Statute of the Special Tribunal for Lebanon’, (2007) 5(5) *JICJ* 1107, at 1121-2; P. Gaeta, ‘To Be (Present) or Not to Be (Present): Trials in Absentia before the Special Tribunal for Lebanon’, (2007) 5(5) *JICJ* 1165.

<sup>195</sup> Rule 108(A)-(B) STL RPE.

<sup>196</sup> Rule 110(C)(ii)-(iii) and (E)(ii)-(iii) STL RPE.

<sup>197</sup> Rule 107 STL RPE.

<sup>198</sup> See Rule 106(A) STL RPE.

<sup>199</sup> Rules 168 and 171 STL RPE.

separately from the evidence relevant to the verdict.<sup>200</sup> This modification in the structure of the trial proceedings sought to repair the perceived flaws of the merged trial scheme. One of them is the need to hear character witnesses before the guilt is established and the waste of court time the presentation of such witnesses brings about where the accused acquitted. Furthermore, the bifurcated trial scheme saves the defence the inconvenience of having to submit information relevant to sentencing while at the same time seeking an acquittal.<sup>201</sup>

These important features aside, the STL trial framework draws upon that of the *ad hoc* tribunals. In part of the distinction between the narrower notion of ‘trial’ and catch-all ‘trial proceedings’, it also inherits inconsistencies that were revealed by the combined reading of the ICTY’s Statute and RPE. Nevertheless, for the sake of terminological consistency it is proposed that under ‘trial proceedings’ in the STL context one ought to understand the proceedings which take place before the Trial Chamber. This covers the interval spanning from the initial appearance to the issuance of the judgment and sentence and therefore includes any preliminary activities conducted under the Trial Chamber’s authority (pre-trial judicial process). However, the notion of ‘trial’ is limited to the fragment of ‘the proceedings before the Trial Chamber’ covered in Section 2 (‘Case Presentation’) of Part Six of the STL RPE. It denotes the set of activities running from the opening statements until the end of closing arguments, thereby excluding deliberation, the delivery of the judgment, and any sentencing proceedings in the case.

### **3. PRACTICAL SIGNIFICANCE OF DELIMITATION: TWO EXAMPLES FROM ICC PRACTICE**

The previous section provided an overview of the legal regimes of nine jurisdictions at issue with view to defining the temporal scope of ‘trial’ in international criminal procedure, its niche in the chronology of the proceedings, and its structural composition as a set of activities in the progression of the process. In several courts, including the *ad hoc* tribunals, the ICC, and STL, the legal framework provides grounds for a formal distinction between the more restricted term of ‘trial’, which essentially denotes the stage of case presentation, and the umbrella notion of ‘trial proceedings’, which includes also any preliminary and post-trial judicial proceedings. But the identification of the moment when trial can be considered to have formally commenced is not clear cut. This is due to what appears an inconsistent resort to, and understanding of, these terms in the legal texts, intermingled with colloquial uses detached from the legal texts that continue to inform the interpretations adopted by procedural actors and by courts.

This section takes the discussion beyond the matter of formal regulation. It is limited to providing two examples from the ICC practice to date both of which attest to the difficulty of discerning the point of the commencement of trial for different procedural purposes. Furthermore, both examples demonstrate that the demarcation of the trial stage has been a live practical issue and that the importance of terminological clarity should not be underestimated. The delimitation of the various procedural stages is bound to raise questions in practice because the exercise of rights and competences by the actors tends to be strictly tied to the deadlines and milestones in the progression of the proceedings. While the examples below concern the ICC alone, this point is equally valid for any other tribunal. In any procedural system, the value of formal definitions and stage-delimitation is not merely theoretical but fraught with consequences for the participants’ status and procedural outcomes.

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<sup>200</sup> See Rule 146(B) STL (omitting such information from the evidentiary sequence at trial) and Rule 171(A) STL RPE (‘If the Trial Chamber finds the accused guilty of a crime, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.’).

<sup>201</sup> STL RPE Explanatory Memorandum (n 157), para. 45 (submitting among others that the introduction of the merged trial scheme at the ICTY and ICTR ‘proved to be a mistake’).

### 3.1 Challenges to the admissibility of the case: *Katanga and Ngudjolo Chui*

The first example illustrating the practical significance of the formal definition of ‘trial’ and its distinction from ‘trial proceedings’ relates to the proceedings for the determination of the admissibility of the *Katanga and Ngudjolo Chui* case. Trial Chamber II had to tackle the question of when the ‘trial’ can be deemed to have formally commenced in the context of an admissibility challenge brought by the defence for Mr. Katanga after the charges against him had been confirmed.<sup>202</sup> Article 19(4) of the ICC Statute provides that the admissibility of a case or of the Court’s jurisdiction may be challenged only once by any person or State concerned, and that such challenges ‘shall take place prior to or at the commencement of the trial’. It also stipulates that the repeated challenges or challenges brought at a later stage will be considered only in exceptional circumstances and with a leave of the Court; finally, the admissibility challenges at the commencement of a trial, or subsequently with the leave of the Court, may be based only on Article 17(1)(c) of the Statute (*ne bis in idem*). Thus, the provision makes it a matter of principle, for the purpose of the timeliness of the admissibility challenge and its requiring leave of the court, whether it is filed before or after the commencement of the trial.

Accordingly, in assessing whether the preconditions for the admissibility of the challenge brought at the post-confirmation stage have been met in order to determine the applicable procedure, the Trial Chamber addressed the question of whether the challenge had been filed prior to or after the ‘commencement of the trial’ in the sense of Article 19(4).<sup>203</sup> It found ambiguity in the Statute and the Rules as regards the moment defining the commencement of the trial. Based on the textual and contextual analysis of the ICC legal instruments, the Chamber determined that certain provisions indicate that a trial commences as soon as the Trial Chamber is constituted pursuant to Article 61(11) and that this notion is not limited to the evidentiary phase alone.<sup>204</sup> But it also recognized that other provisions might warrant a narrower interpretation of ‘trial’ as the stage which starts with opening statements.<sup>205</sup> The third class of provisions is ambiguous and inconclusive for the purpose of discerning the ordinary meaning of the term ‘trial’.<sup>206</sup> On the basis of this overview, the Chamber ruled that none of the concurring interpretations of the term ‘commencement of trial’ prevails over the other and that the determination of the meaning of the term ‘trial’ should be procedure-specific.<sup>207</sup> In case of the challenges to admissibility of the case pursuant to Article 19(4), the Chamber applied the principle of teleological interpretation and concluded that the objective of the provision is the avoidance of needless delays. This led the

<sup>202</sup> Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-891-Conf-Exp, Defence, ICC, 10 February 2009. The public version was released on 11 March 2009 (ICC-01/04-01/07-949).

<sup>203</sup> Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Art. 19 of the Statute), *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-1213-tENG, TC II, ICC, 16 June 2009 (*Katanga and Ngudjolo* admissibility trial decision), para. 30.

<sup>204</sup> *Ibid.*, paras 38-9, citing Arts 61 (title); 63; 64(2), (3)(a) and (b) and (7); 67 [sic: 1] (d); 74(1); 85 [title, in the French version]; and 93(10)(b)(i)(a) ICC Statute and Rules 39 [French version], 137 and 165 (title) ICC RPE, as well as noting Regulation 86 (3). On a closer look, only some of the mentioned provisions may be deemed to conclusively uphold the interpretation given to them by the Chamber: see Arts 64(2) and 67(1)(d) ICC Statute.

<sup>205</sup> *Ibid.*, paras 37 and 40, citing Arts 61(5) and (9); 64(2) [French version], (6), (8)(b), and (10); 74(2); 76(1); 83(2) (b); 84(1)(b) and Rules 77, 78, 81(2) and (4), 84, 94(2), 128(1), 132(1), 134(1) and (2), 135(4), and 138 ICC RPE, as well as noting Regulations 55(2) and 56. The Chamber overlooked other provisions which support the narrow interpretation of ‘trial’: e.g. Art. 64(3)(c) and 8(a) ICC Statute.

<sup>206</sup> *Ibid.*, para. 36, citing Arts 31(3), 56(3)(a), 56(4), 61(9), 62, 64(7), 65(3), 65(4)(b), 68(5), and 84(1)(a) ICC Statute and Rules 58(2), 80(1), and 122(4) ICC RPE. The majority of the provisions cited by the Chamber lend stronger support to the narrow interpretation of ‘trial’, save for Arts 62, 64(7) that can indeed be deemed inconclusive on their textual and contextual reading.

<sup>207</sup> *Ibid.*, paras 41-2.

Chamber to adopt a broad interpretation of ‘trial’ and to construe the notion of the ‘commencement of the trial’ as the moment when the Trial Chamber is constituted.<sup>208</sup>

Therefore, it ruled that the defence motion had been filed out of time and should have normally been declared inadmissible, but also held that the ambiguity of the statutory framework and good faith on the part of the defence warrant its exercise of discretion in considering the challenge on its merits.<sup>209</sup> The defence filed an appeal, with one of the grounds being the Trial Chamber’s finding that the motion had been filed out of time.<sup>210</sup> In its judgment on this matter, the Appeals Chamber refused to address the issue on the merits because the accused himself had recognized that the Trial Chamber’s interpretation had not resulted in any prejudice and because the alleged error had not materially affected the trial decision, which would be the precondition for review.<sup>211</sup> Since the Trial Chamber had eventually considered the admissibility challenge on the merits, the Appeals Chamber regarded its interpretation of the ‘commencement of the trial’ as *obiter dicta* and not a matter properly before it.<sup>212</sup> Nonetheless, it emphasized, in a rather extraordinary manner, that it did not necessarily agree with the Trial Chamber’s interpretation.<sup>213</sup> The Appeals Chamber thus clearly wished to prevent that its judgment is referred to in the future as supporting Trial Chamber II’s understanding of the ‘commencement of trial’ as the moment when the Trial Chamber is constituted.

It is not difficult to see that, while in this specific case, the Trial Chamber’s interpretation did not result in prejudice for the defence, it could have well been otherwise because the Chamber agreed to decide on the admissibility of the case as a matter of discretion rather than as a matter of its legal obligation under Article 19(4). In another case, such an approach may have well prejudiced a party. Even though the Appeals Chamber declined to rule on this matter, there are several reasons why the Trial Chamber’s definition of ‘trial’ may have been incorrect and not based on the most plausible interpretation of the Statute. First, as noted, one may take issue with the Chamber’s allocation of the various provisions it referred to into the three categories. In citing the various norms of the Statute, RPE, and Regulations of the Court, the Chamber does not discuss them in detail; it ultimately gives no reasons for its conclusion that the two interpretations are equally supported by the legal framework, whereas the ‘narrow’ interpretation of the ‘trial’ is more warranted.<sup>214</sup> Arguably, it was unnecessary for the court to engage in an extensive contextual interpretation

<sup>208</sup> *Ibid.*, paras 43-9, ruling that after the confirmation of charges, only *ne bis in idem* challenges (Art. 17 (1) (d) ICC Statute) are allowed – prior to the constitution of the Trial Chamber as of right and afterwards only in the exceptional circumstances and on the leave of the Trial Chamber.

<sup>209</sup> *Ibid.*, paras 56-8.

<sup>210</sup> Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire*’, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-1234, Defence, ICC, 22 June 2009; see also, in the same case, Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber..., ICC-01/04-01/07-1279, 8 July 2009, para. 41 (‘The Defence appreciates that it was not prejudiced by the Trial Chamber’s erroneous interpretation of the time limit for filing an admissibility challenge pursuant to Article 19(4) of the Rome Statute because it reviewed the admissibility challenge on its merits. The Defence nonetheless requests the Appeals Chamber to review the Chamber’s erroneous interpretation .... The Trial Chamber’s interpretation of the commencement of trial may have wider implications and creates confusion regarding the interpretation of other provisions relating to the commencement of trial. It is also important for future applicants that the Trial Chamber’s error be corrected.’).

<sup>211</sup> Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-1497, AC, ICC, 25 September 2009, paras 37-38.

<sup>212</sup> *Ibid.*, para. 38 (‘The Appeals Chamber considers it inappropriate to pronounce itself on *obiter dicta*. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it.’).

<sup>213</sup> *Ibid.* (‘the fact that the Appeals Chamber is refraining from pronouncing itself on the merits of the issue raised under the first ground of appeal does not necessarily mean that it agrees with the Trial Chamber’s interpretation of the term “commencement of the trial” in article 19 (4) of the Statute.’).

<sup>214</sup> See nn 204-206.

of the provision, which it itself admitted to be superficial and shaky.<sup>215</sup> Article 19(4) establishes an unconditional right to challenge the admissibility of the case ‘prior to ... the commencement of the trial’, which must be read jointly with Article 64(8)(a) of the ICC Statute. As noted, it is the central provision defining the stage of ‘commencement of the trial’,<sup>216</sup> but inexplicably and regrettably it was not even considered by the Chamber. If the Chamber had taken due note of this norm as controlling the issue at hand, it would not have hesitated to determine that the trial had not yet commenced for the purpose of Article 19(4) and, consequently, that the defence’s challenge to the admissibility filed between the moment of the constitution of the Trial Chamber and the proceedings under Article 64(8)(a) is unconditionally admissible. Finally, the teleological argument relied upon by Trial Chamber II in its procedure-specific analysis of Article 19(4) is not persuasive either. While the avoidance of delays may indeed be an important consideration and a reasonable limitation on the timing for filing any admissibility challenges, it cannot with certainty be posited as the only or the most important ‘object and purpose’ of Article 19(4). There are other plausible interpretations that can be used to advocate giving subjects named in Article 19(2) an unconditional right to challenge the admissibility before the trial proper starts. More generally, Article 19(4) serves to prevent the Court from trying an inadmissible case. This rationale militates against preventing the accused from challenging the competence of the Trial Chamber after his case has been assigned to it citing technical formalities.

In fact, the *Katanga and Ngudjolo* Trial Chamber adopted from the outset an erroneous conception of the ‘commencement of trial’; its treatment of the admissibility challenge under Article 19(4) was a fruit of that misconception. It revealed the early sign of the misinterpretation of the statutory framework already at the first status conference on 27 November 2008 in the case upon its constitution. It is during that status conference, rather than at a later stage of the ‘commencement of the trial’ that the Chamber prematurely had the charges read out, invited the accused to enter their pleas to the charges under Article 64(8)(a), and received the pleas of not guilty to all charges from both accused.<sup>217</sup> Clearly, a status conference is not a proper occasion for this type of activities.<sup>218</sup> The defense counsel did not object as they had been assured that another reading of the charges would take place and that another possibility to plead would be given ‘at the opening of the trial proper’.<sup>219</sup> The correct denomination of the procedural phase at hand would have been with reference to the period prior to the commencement of the trial or, in terms of Article 64(3), to the stage ‘upon assignment of a case for trial’.<sup>220</sup> This is when the Trial Chamber assigned to deal with the case shall: (a) confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings; (b) determine the language or languages to be used at trial; and (c) provide for disclosure of documents or information not previously disclosed, *sufficiently in advance of the commencement of the trial* to enable adequate preparation for trial. After receiving pleas of the defendants Katanga and Ngudjolo, Trial Chamber II proceeded to solving household issues set out in Article 64(3). This indicates that it had not yet been at the stage foreseen in Article 64(8)(a) and that in soliciting and receiving the accused’s pleas, it was acting *ultra vires*. By contrast, the Trial Chambers in all other

<sup>215</sup> Notably, the tone of the Chamber’s discussion of the provisions it cited in support of its construction of the term ‘commencement of the trial’ in Art. 19(4) ICC Statute is marked by uncertainty as to its accuracy. See *Katanga and Ngudjolo* admissibility trial decision (n 203), para. 38 (‘Without prejudging a contrary interpretation arising from a more in-depth analysis that could be given the Chamber or any other chamber having to rule on one of these provisions, the following provisions seem to fall in the first category’. Emphasis added.)

<sup>216</sup> See *supra* 2.3.

<sup>217</sup> 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 10-32.

<sup>218</sup> See Rule 132 ICC RPE; Regulation 54 Regulations of the Court.

<sup>219</sup> Transcript, *Katanga and Ngudjolo* (n 217), at 15.

<sup>220</sup> See *supra* 2.3.



cases to date have correctly provided for the reading of the charges and invited the accused to admit guilt or enter a plea of not guilty on the day of the opening of the trial proper, not earlier.<sup>221</sup>

### 3.2 Post-confirmation withdrawal of charges: *Muthaura*

Another, more recent occasion on which the question concerning the procedural point at which the ‘trial’ is deemed to have formally commenced was raised, was in the *Kenya II* case in connection with the withdrawal of charges against one of the defendants. After the charges against Kenyatta and Muthaura had been confirmed and their case had been referred to the Trial Chamber,<sup>222</sup> the ICC Prosecutor announced at the status conference that she had decided to withdraw the charges against Muthaura.<sup>223</sup> She argued subsequently that she held discretion to withdraw the charges and that it was not necessary for the Chamber to grant leave to do so because the trial had not yet commenced for the purposes of Article 61(9) of the Statute; alternatively, she argued that, if the Chamber deemed such leave to be required, leave should be granted because the prosecution evidence was insufficient to guarantee the prospect of conviction.<sup>224</sup> The bifurcate measure of relief sought by the OTP indicates the ambiguity in the ICC legal framework as to whether the prosecution holds a power to unilaterally withdraw charges after those have been confirmed and before the trial formally commenced.

The Statute authorizes the OTP to ‘amend or withdraw’ the charges before the confirmation hearing upon reasonable notice to the suspect and, in case of withdrawal, notification to the Pre-Trial Chamber of the reasons.<sup>225</sup> As noted, after the confirmation of charges and before the trial has begun, the charges may be *amended* by the Prosecutor with the permission of the PTC and after notice to the accused; but ‘[a]fter commencement of the trial’, the charges may be withdrawn ‘with the permission of the Trial Chamber’.<sup>226</sup> As recognized both by the OTP and subsequently by the Trial Chamber, Article 61(9), however, says nothing about the procedure for the withdrawal of charges in the intermediate period between the confirmation of charges and the commencement of trial, which was deemed to be exactly the stage at hand.<sup>227</sup> Thus, a determination of whether leave to withdraw charges is formally required would depend essentially on the moment when the trial can be considered to have formally begun.

The Trial Chamber’s decision on this matter was split and accompanied by two separate opinions.<sup>228</sup> The majority adhered to the *Lubanga* interpretation of the

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<sup>221</sup> Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-107-ENG, TC I, ICC, 26 January 2009, at 2-3; Transcript, *Prosecutor v. Bemba, Situation in the CAR*, ICC-01/05-01/08-T-32-ENG, TC III, ICC, 22 November 2010, at 4-9; Transcript, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-27-ENG, TC V(a), ICC, 10 September 2013, at 8-14.

<sup>222</sup> Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012 and, in the same case, Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, ICC-01/09-02/11-414, 29 March 2012.

<sup>223</sup> Decision on the withdrawal of charges against Mr Muthaura, *Prosecutor v. Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-696, TC V, ICC, 18 March 2013 (‘*Muthaura* withdrawal of charges decision’), para. 6.

<sup>224</sup> Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, *Prosecutor v. Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-687, OTP, ICC, 11 March 2013 (‘*Muthaura* OTP notification’), paras 7-12.

<sup>225</sup> Art. 61(4) ICC Statute.

<sup>226</sup> Art. 61(9) ICC Statute.

<sup>227</sup> *Muthaura* OTP notification (n 224), para. 2; *Muthaura* withdrawal of charges decision (n 223), para. 10 (‘The provision does not squarely address the situation which is now before the Chamber where charges are withdrawn after the confirmation decision but before commencement of the trial.’).

<sup>228</sup> Partial dissenting Opinion of Judge Ozaki and Concurring Separate Opinion of Judge Eboe-Osuji, Decision on the withdrawal of charges against Mr Muthaura, *Prosecutor v. Muthaura and Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11-698, TC V, ICC, 19 March 2013.

commencement of trial as ‘true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses’.<sup>229</sup> However, without providing reasons save for an inconclusive reference to a general authority to conduct trial under Article 64(2),<sup>230</sup> the majority considered that ‘the withdrawal of the charges against Mr Muthaura may be granted’ and, accordingly, granted the prosecution permission to withdraw the charge and terminated the proceedings.<sup>231</sup> In her dissenting opinion, Judge Ozaki opined that, based on the plain reading of Article 61(9), leave of the Trial Chamber was not required for the prosecution to withdraw the charges at the stage ‘after the confirmation hearing and prior to the commencement of trial’.<sup>232</sup> She holds that Article 61(9) is *lex specialis* on the issue of post-confirmation withdrawal or amendment of charges and insofar as it was silent on the issue of the Chamber’s permission for the OTP to withdraw charges prior to the commencement of the trial, leave was not required and the proceedings should have simply been terminated.<sup>233</sup> On the issue of the commencement of trial, Judge Ozaki stated that she had concurred with the majority in holding that it commences, ‘in the relevant sense, once the charges are read to the accused and opening statements are made followed by the presentation of evidence’.<sup>234</sup>

The other Trial Chamber judge, who wrote a separate concurring opinion, considered that the withdrawal of charges after the confirmation of charges and before the commencement of the trial was a matter of the Chamber giving its permission, as opposed to a matter of prosecutorial discretion.<sup>235</sup> But rather than referring to Article 64(3) relied upon in the majority decision, Judge Eboe-Osui endorsed the argument advanced by the victims counsel, which was supported by the procedure of the *ad hoc* tribunals.<sup>236</sup> Among others, his position was based on the contention that ‘unfettered discretion in the Prosecutor to withdraw confirmed charges at any stage is inconsistent with the general flow of the Rome Statute’,<sup>237</sup> including ‘the interests of the defendants, victims, and orderly administration of justice.’<sup>238</sup> The silence of Article 61(9) in respect of the need for the prosecution to obtain permission to withdraw charges prior to the commencement of the trial (and to provide notice to the accused and a reasoned notification to the Trial Chamber) was deemed as nothing else but ‘an error of

<sup>229</sup> *Muthaura* withdrawal of charges decision (n 223), para. 10 n16, referring to *Lubanga* status of evidence trial decision (n 43).

<sup>230</sup> Art. 64(2) ICC Statute (‘The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’). Critical of this point, see also Partly dissenting opinion of Judge Ozaki (to the Decision of the Majority dated 18 March 2013) (n 228), para. 3 (rejecting ‘the implicit premise of the Majority’s position that such a requirement can be read into the Statute by reference to the Trial Chamber’s authority, set out in Article 64(2) of the Statute, to regulate the conduct of the proceedings. ... Any limitation on the Prosecution’s authority to modify or withdraw the charges must be expressly provided for in the Statute.’).

<sup>231</sup> *Muthaura* withdrawal of charges decision (n 223), para. 11 and at 8.

<sup>232</sup> Partly dissenting opinion of Judge Ozaki (to the Decision of the Majority dated 18 March 2013) (n 228), para. 1.

<sup>233</sup> *Ibid.*, paras 2 and 5.

<sup>234</sup> *Ibid.*, para. 2. One may notice that the concurrence of Judge Ozaki in this respect is partial insofar as she refers to the reading of the charges as the moment of the commencement of the trial, whereas the majority considers the opening statements as the ‘true opening of the trial’.

<sup>235</sup> Concurring separate opinion of Judge Eboe-Osui (to the Decision of the Majority dated 18 March 2013) (n 228), para. 1.

<sup>236</sup> Rule 51(A) ICTY RPE (‘The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President.’).

<sup>237</sup> Concurring separate opinion of Judge Eboe-Osui (to the Decision of the Majority dated 18 March 2013) (n 228), para. 11 (adding that ‘[i]n particular, it is inconsistent with the rights of the defence, the interests of victims (which have been given explicit recognition in the process of the ICC), and, the interest of general order in the administration of justice in this Court.’).

<sup>238</sup> *Ibid.*, para. 29.

omission in legislative drafting'.<sup>239</sup> The judge chose to deal with this 'legislative omission' in Article 61(9) by giving it interpretation such that the provision would require leave for the withdrawal of the charges at that stage to be obtained.<sup>240</sup> One does not need to agree with this methodology and all judicial policy arguments behind it<sup>241</sup> to acknowledge that it may well be true that the failure to stipulate a procedure for the withdrawal of charges in the post-confirmation stage is a result of a drafting omission. Moreover, the analogy with Article 61(4) that allows a unilateral retraction of charges in the pre-confirmation is arguably inappropriate, given that at the subsequent stage the withdrawal will implicate the judicial authority.<sup>242</sup>

Notably, all three opinions—that of the majority and those by the judges who wrote separately—coincided in holding that the trial is to be considered to have begun when the opening statements are made.<sup>243</sup> This view, which draws upon the previous pronouncement in *Lubanga*, is not impeccably accurate given that Article 64(8)(a) of the ICC Statute which defines the 'commencement' of the trial as the first hearing at which the charges are read and the plea is entered. The query by Judge Eboe-Osuji as to what makes opening statements so legally special that their delivery ostensibly removes the prosecution's discretion to withdraw charges without leave should be seen in this light. Such is the nature of the orderly administration of justice that the operation of the procedural system rests on the formally established milestones and deadlines for procedural actions. Furthermore, it is material that under the interpretation that the silence in Article 61(9) should entail the power to withdraw charges without leave, said change in the legal status of the prosecution, if any, is in fact anchored to an earlier moment that precedes the delivery of opening statements: the reading of charges and the opportunity to enter a plea. It makes sense indeed that the charges may not simply be withdrawn *after* that moment without the Chamber's permission, inasmuch as the trial on them has formally commenced and the defendant has chosen to contest the charges.

In the *Muthaura* case, the main point of judicial contention was the appropriateness of a formalist *v.* purposive approach towards the interpretation of the procedural provisions in the ICC Statute and the role of judges at gap-filling. But the calculation of the kick-off moment for the trial was an integral part of the *ratio decidendi* in both majority and minority views. This demonstrates that the temporal span and the composition of the trial before the ICC have been of an obvious practical importance. It is clear that should the commencement of the trial have been associated with any other landmark moment in the procedural chronology (for example, the assignment of the case to the Trial Chamber), the controversy would not have arisen.

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<sup>239</sup> *Ibid.*, para. 12 ('The sense of that error begins to emerge if one considers that article 61(9) of the Statute clearly requires such permission for withdrawal of charges after commencement of the trial... But there is no sensible rationale yet advanced to explain the legal difference that an opening statement makes, such that properly removes a discretion that the Prosecutor supposedly enjoyed minutes before its delivery. Without that explanation, we are left with the impression that the administration of justice in this Court must be left a slave to the sort of practice that has been deprecated as the 'austerity of tabulated legalism.'). See also *ibid.*, paras 13-15 ('the Prosecutor should not be permitted to withdraw confirmed charges before commencement of trial simply because article 61(9) is silent as to that possibility. ... It is enough to see this argument as implicating a drafting error of omission.').

<sup>240</sup> *Ibid.*, paras 16-28.

<sup>241</sup> See e.g. Concurring separate opinion of Judge Eboe-Osuji (to the Decision of the Majority dated 18 March 2013) (n 228), paras 30-33.

<sup>242</sup> *Ibid.*, para. 34 ('Upon confirmation of charges, however, the case becomes impressed with judicial imprimatur.')

<sup>243</sup> *Muthaura* withdrawal of charges decision (n 223), para. 10; Concurring separate opinion of Judge Eboe-Osuji (to the Decision of the Majority dated 18 March 2013) (n 228), para. 12; Partly dissenting opinion of Judge Ozaki (to the Decision of the Majority dated 18 March 2013) (n 228), para. 2.

## 4. CONCLUSION

This Chapter's objective was to define the temporal span and composition of the trial stage in international criminal proceedings as a way of providing a roadmap into the subsequent in-depth discussion of the organization of the trial process before international and hybrid criminal jurisdictions. The overview provided above indicated, for each jurisdiction, what niche the trial occupies within the structure of the process and how the stage can be demarcated from the pre-trial and preliminary proceedings. It also addressed the issue of phasing, or composition of trial proceedings before the nine courts surveyed. The juxtaposition of the legal frameworks of those jurisdictions for the purpose of drawing a synthetic or average definition of trial presents some challenges. The statutes and RPE are not always clear when it comes to the procedural chronology. Nor are they homogeneous in delimiting the temporal boundaries of the trial phase and identifying the procedural units comprised therein. But if one puts the pieces of the cross-tribunal mosaic together, the following general observations can be made.

First, the delimitation of the trial proceedings from the appeals is not particularly problematic.<sup>244</sup> But in formal terms, the lines between the pre-trial and trial process are often blurred due to the existence of intermediate or preliminary proceedings conducted under the authority of the trial court. One may infer from the ICTY, ICTR, SCSL, and STL statutes that initial (and further) appearance of the accused and subsequent proceedings for the purpose of trial-preparation form part of trial proceedings. But the Rules adopt a functional approach to defining the procedural stages as they allocate the same interval under the category of 'pre-trial proceedings' spanning until the commencement of trial proper. The border between the pre-trial and trial judicial function is thin due to the confluence of the responsibility for the case-preparation and trial-adjudication in a single authority of the Trial Chamber (even if exercised by a PTJ or designated judge who is a member of the Chamber). By contrast, in the ICC, SPSC, and ECCC, the first appearance of the suspect before a judicial authority (respectively, the PTC, Investigating Judge and CIJ) takes place at an earlier stage – before the confirmation of an indictment or charges and before the trial court is seized with the matter which signifies the end of pre-trial proceedings.<sup>245</sup> Here, the pre-trial judicial function is distinct from the trial court function and this separation is drawn along the institutional lines dividing the different Chambers.

Secondly, legal texts of all jurisdictions surveyed provide grounds for distinguishing between the notions of 'trial proceedings', on the one hand, and 'trial' in the proper sense, on the other hand. The latter notion denotes a procedural interval that is considerably narrower than, and subsumed by, the period labelled as 'trial proceedings'. Next to the trial stage, 'trial proceedings' encompass any preliminary steps taken by the parties and the trial court in the preparation for the trial, which thus form the organic part of the trial process, as well as the post-trial activities such as the deliberations, delivery of the trial judgment and sentence (with the possibility of separate sentencing procedure and judgment and reparation hearing and orders). 'Trial' generally refers to the core stage of the trial process at which the case is heard, this being a sequence of submissions and evidentiary presentations by the parties and

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<sup>244</sup> For a pertinent observation in the context of domestic criminal process, see J. Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure', in A. Duff *et al.* (eds), *The Trial on Trial, Vol. 2: Judgement and Calling to Account* (Oxford/Portland, OR: Hart Publishing, 2006) 241 ('Given the centrality of the pre-trial process in determining both issues of fact and evidence, we might ask, not where does the process of trial end, but where does it begin?' Footnote omitted).

<sup>245</sup> See also Friman, 'Investigation and Prosecution', in Lee *et al.* (eds), *Elements of Crimes and Rules of Procedure and Evidence* (n 38), at 531 n104 ('There is difference between the Court [ICC] and ICTY/ICTR [and] the term "pre-trial" relates to different stages of the proceedings. In respect of the Court, the term relates to proceedings until the confirmation of charges, while this term is used in the Rules of the ICTY and ICTR to cover proceedings from the initial appearance before the Tribunal (after the confirmation of an indictment) until the commencement of trial.')

## Chapter 7: Defining the Trial Stage

participants on the merits. In some jurisdictions, there is a distinct phase for the formal opening of trial—e.g. initial hearing at the ECCC and ‘commencement of trial at the ICC—reserved, among others, for reading the charges, ensuring that the accused understands them, and for giving the accused an opportunity to admit guilt or to plead not guilty. The trial hearing itself may further be disassembled into several consecutive steps including: opening statements by the parties (and possibly by victim participants and accused); presentation of evidence (and, where a merged trial scheme is adopted, the information that may assist the Trial Chamber in the determination of an appropriate sentence); and closing arguments by the parties (and possibly, victim participants and final statement by the accused). While this general outline of trial proceedings is followed in all of the jurisdictions surveyed, there is a wide variance between them in how these phases are organized and sequenced and in what rights, duties, and competences the parties (and participants) possess in the context of the distinct components of the trial. This Chapter only scratches the surface of this divergence. The detailed comparative overview and analysis of the differences and similarities between the anatomies of trial in the jurisdictions at hand is provided in the chapters that follow.

Finally, the Chapter has demonstrated, on the basis of two limited examples from the ICC practice, that the matters of procedural chronology and the formal division of trial into distinct phases are more than academic queries or technical hairsplitting. In fact, these issues are of utmost practical importance because in any procedural system the legal status of the parties and participants and the competence of the court will vary depending on what stage of the proceedings has been reached. Consequently, inconsistencies in legal texts and case-law interpretations in this respect are fraught with a risk of disorientation and undermine procedural certainty. This is particularly visible where the milestones signifying the commencement and the end of various procedural phases are associated with the deadlines for filings and decisions affecting the legal status of the participants. The Chapter tackled these issues against the backdrop of controversies that have arisen at the ICC regarding the moment of the ‘commencement of trial’ in the context of the proceedings on a challenge of the admissibility of case in *Katanga and Ngudjolo* and in respect of the procedure for the withdrawal of the charges against Muthaura in the post-confirmation/preliminary stage of trial proceedings. These instances illustrate vividly that unclear or inconsequent legal regulation of the defining moments of the trial stage poses problems for the determination of the rights and powers of the procedural players. It is also bound to lead to litigation and judicial contentions around these issues that are best avoided in a developed and coherent procedural system. Therefore, when carving out the procedural scheme for the tribunals, the responsible legislators (and judges) are advised to pay particular attention to ensuring a seamless flow in the progression of the proceedings, as a matter of legal drafting technique. This will guarantee that the procedural fabric is free from interstices and that the milestones to which procedural consequences attach are not left undefined.