International criminal trials: A normative theory

Vasiliev, S.

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TRIAL PREPARATION: SETTING THE SCENE

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1. INTRODUCTION

The previous Chapter provided an initial overview of the structure and approximate contents of the trial stage across international and internationalized criminal courts. A synthetic definition has been proposed and a temporal framework of ‘trial proceedings’ and ‘trial’ as its core part delineated. The current task is to draw a more detailed picture of the cogs and wheels of the trial process before the tribunals. While drawing upon the previous discussion which disassembled the trial proceedings into constituent steps, this part of the book presents the ‘anatomy’ of the trial procedure by systematically exploring, comparing, and critiquing the trial arrangements across the board. This enables one to reveal the material differences in the format and organization of the trial stage between various jurisdictions, both as a formal legal matter and in terms of how those legal regimes have operated (or can be expected to operate) in practice. The resulting critique feeds into the normative theory on the optimal format of trial before international criminal courts.\(^1\)

More specifically, the present Chapter accomplishes these descriptive and analytical objectives in relation to the segment of trial proceedings that precedes the ‘trial’, in the narrow sense of the hearing of a case on the merits. One is bound to recall uncertainties that persist regarding the moment in the procedural chronology at which the trial stage is deemed to commence owing to the plurality of the terms used and inconsistencies in the legal frameworks. Thus, while the ICTY and ICTR statutes may give rise to the interpretation that the trial proceeding (but not trial) formally starts with the initial appearance at which the charges are read out to the accused and the plea is received, the Rules warrant another interpretation according to which the same actions or steps taking place thereafter are part of ‘pre-trial proceedings’.\(^2\) Furthermore, there is no single moment in the progression of the proceedings which uniformly signifies the commencement of the trial stage in all tribunals. In the ICC regime, the preparation for trial occurs between in the interval between the confirmation of charges and up to the ‘commencement of trial’, the hearing that fulfils functions similar to the ICTY and ICTR’s ‘initial appearance’.\(^3\) In contrast with the *ad hoc* courts, the relevant time period falls within the scope of trial proceedings under the ICC Statute and Rules, although whether they are also subsumed by the notion of ‘trial’ has been

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1 Chapter 12.
2 Chapter 7. See e.g. Art. 20(3) ICTY RPE; Art. 19(3) ICTY RPE. Cf. Rules 62-73ter ICTY RPE v. Rules 62-72 and 73 bis/73ter ICTR RPE and Rules 61-72 and 73 bis73ter SCSL RPE.
3 Arts 64(3), (6), (8)(a) ICC Statute; Rules 131-134 ICC RPE.
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controversial. To make this picture look even more diverse, the trial proceedings before the ECCC comprise the phase of the preparation of trial coordinated by the Trial Chamber, the initial hearing which formally marks the beginning of the ‘trial’ but is preliminary in nature, and the preliminary stage of the substantive hearing at which the counts will be read before the opening statements can be delivered and the court may proceed to the interrogation of the accused.

Self-evidently, this diversity poses difficulties for the purpose of breaking down the trial proceedings neatly into distinct stages that could be dealt with as closely analogous units susceptible to cross-jurisdictional comparison. Dealing with procedures that are part of ‘trial proceedings’ or ‘trial’ proper in certain courts while refraining from covering analogous proceedings in other courts on the ground that they fall beyond either one or the other would be an overly formalistic approach. For the sake of comparative exercise, this Chapter and chapters that follow force slightly more consistency on the fragmented framework of the ‘trial proceedings’ than there currently exists in international criminal procedure. The relevant topics are therefore covered in respect of all of the jurisdictions at hand, regardless of whether the proceedings at hand are formally regarded as part of the trial or pre-trial proceedings.

This Chapter addresses the preliminary stage of the trial proceedings which commences upon the assignment of the case to a trial chamber and during which the case is prepared for trial. This procedural interval is fairly extensive and rich in activities, of which—if one takes the ICTY/ICTR procedural model as an example—any initial and further appearances and the entry of a plea, disclosure and the resolution of preliminary and other motions should be mentioned. This warrants making a narrow selection of the topics. As pointed out in Chapter 6, the evolution of international criminal justice from historic post-WW II tribunals to the most recent forms of hybrid justice has seen a consistent trend for the pre-trial proceedings to become increasingly sophisticated. The cornerstone of this tendency was the expansion of the role played by the judges in the early stages of proceedings with the functions of expediting the preparation for trial and streamlining the trial *ex ante* through various measures of case management. Those have included, for example, judicial orders for the parties to submit pre-trial briefs outlining the nature of their cases, to state the issues of, and reasons for, disagreement and providing the overview of evidence in advance of the trial. On that basis, the judges may order the parties to work further on the identification of issues genuinely in dispute, to reduce a number of witnesses or shorten the time for the presentation of evidence, and—in respect of the prosecution—to refrain from leading evidence regarding certain crime sites and incidents and to select counts on which to proceed.

This novel judicial capacity embodies the concept of a judge as a proactive and efficient manager with pre-trial access to evidence. The judicial case-management in the pre-trial stage serves to ensure that the evidentiary preparation for trial and case presentation during trial proceedings can be kept within reasonable limits, which is achieved through the reduction of the scope of contest on facts between the parties and limiting the quantum of evidence that can be presented. The rationale of the managerial measures is therefore to narrow down the ambit of the dispute rather than to serve judges as a platform for fact-finding before the trial hearing proper. The pre-trial access to evidence or detailed information about it and the competence to limit the case presentation distinguishes the concept of manager-judge from a pure adversarial ideal of adjudicator as impartial and passive umpire. At the same time, that concept falls short of an inquisitorial institute of *juge d'instruction*, the investigative judge endowed with the function of collection of evidence and conducting investigation in the pre-trial stage. In the context of international criminal proceedings, this new *sui generis* judicial role has appositely been referred to by the term ‘managerial judging’,

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4 See Chapter 7.
5 Rules 79(7) and 80, 80bis, 89, 89bis, 90 ECCC IR.
borrowed from the domain of civil litigation practice in the US.\(^6\) Similarly geared to expedite the proceedings, the managerial judging in international criminal law is devised to address the problem of excessively lengthy and complex trials and offers a solution based on the increased judicial control to counteract the dilatory effects of party-driven process. As opposed to the work of a judge or Chamber confirming the indictment or charges, the trial preparation measures are normally carried out by or under supervision of the Trial Chamber that will try the case. The formalized pre-trial judicial function and the need to regulate judicial measures for ensuring the trial-readiness of the case have led to the emergence of a relatively autonomous preliminary phase of ‘trial preparation’. In the procedural chronology of the trial process, this intermediate phase runs from the initial appearance of the accused (before the courts like ICTY, ICTR, SCSL and STL, where the indictment is confirmed in an \textit{ex parte} Prosecutor-only procedure), or from the confirmation of charges (ICC) to the commencement of the trial proper, that is, in most courts, before the parties are invited to deliver their opening statements. In the jurisdictions that follow the ‘adversarial model’ for the presentation of evidence, the taking of proof unfolds in two cases, and there the intermediate phase consisting of preparatory measures is resumed once the Prosecution rests its case-in-chief. The example is the Pre-Defence Conferences in the ICTY, ICTR, SCSL and STL, which enable the Judges to manage the Defence case. Although such activities chronologically fall under the trial procedures, they are preparatory by nature and pertain to the intermediate phase rather than trial. The timing and rationale of those activities conducted on the eve of evidentiary trial hearings point unequivocally to the cogency of examining them as a part of ‘trial proceedings’.

Given the importance of these developments both in individual tribunals and as the general trend for the future, the Chapter focuses on the competences of judges in the preparation of the case for trial, the procedural arrangements in which those powers are exercised, the extent of knowledge of the prospective case that enables them to effectively do so, and the scope of case-managerial measures that may be carried out based on that information. This justifies the consideration of issues such as initial and further appearances, status conferences and trial-preparation meetings and conferences, filing duties borne by the parties, and managerial powers of the judges. In line with the approach adopted in this study, the matters of evidence as may be relevant to the present stage (in particular, the law and practice concerning the disclosure of, or access to, evidence as well as the criteria of admissibility) are not covered. In addition, the matters raised by the consensual and negotiated justice—guilty pleas, admissions of guilt, confessions and agreement on fact—have been touched upon earlier and are excluded, even though falling within temporal period covered.\(^7\)

The chapter starts by addressing the approach to preliminary and preparatory proceedings in the domestic contexts, as a background discussion to the law and practice in international tribunals (section 2). Section 3 reviews the procedural arrangements falling within the trial-preparation stage across nine jurisdictions concerned, with attention to the format and modes of trial preparation (status and pre-trial conferences, trial management

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\(^6\) See M. Langer, ‘The Rise of Managerial Judging in International Criminal Law’, (2005) \textit{American Journal of Comparative Law} 835, at 874-85, applying the theory of ‘managerial judging’ to the evolution of the ICTY procedure. For the original exposition of the theory in its native habitat, see J. Resnik, ‘Managerial Judges’, (1982-83) 96 \textit{Harvard Law Review} 374, at 377-9. The notion of ‘managerial judging’ has become a term of art in international criminal procedure, being indirectly accepted by the ICTY as a fitting description of the judges’ role: see \textit{ICTY Manual on Developed Practices} (Turin: ICTY-UNICRI, 2009) 77, para. 1 (‘In the ICTY, trials are controlled by panels of Judges who collectively have adopted an approach which has been described as “managerial judging”. Under this approach, the Judges regulate the parties’ activities using an essentially adversarial procedure. ICTY trials are conducted under very precise timetables, and prosecutions are controlled before the Trial Chambers more strictly than is typical in national courts. Judicial control extends to the scope of the indictment, the number of witnesses a party may lead, and the exact time to be allotted for examination and cross examination of each witness.’).

\(^7\) Chapter 6.
meetings etc.), filing duties of the parties, and the scope of case-management powers of the judges. The Chapter then turns to the evaluation of the court’s legal frameworks and practice in light of the normative criteria defined in Part I of the book and concludes by putting forth some critical observations and recommendations for the optimization of the law and practice related to the preliminary phase of the trial proceedings before international and hybrid courts.

2. PRELIMINARY PHASE OF TRIAL PROCEEDINGS IN A COMPARATIVE PERSPECTIVE

Measures aimed at reducing the scope of litigation and evidence in complex criminal cases and the addition of managerial functions to the traditional adjudicative role of judges are features that are not unique to international criminal procedure. The national judiciaries have too been faced with the problem of excessive caseloads and lengthy criminal proceedings. One solution for which was the increased resort to consensual disposition of cases. Besides encouraging negotiated settlements and summary proceedings in uncontested trials—openly as in common law or less so as in some Continental countries—the other solution has been the increased judicial involvement in pre-trial case-management from early stages on. But the structural differences in criminal procedure and institutions in the two legal traditions, in particular the diverging roles of parties in the collection of evidence and the preparation of the case for trial inform the urgency of judicial case management and predetermine the arrangements in place. Consequently, different legal cultures have espoused diverging approaches towards the idea of managerial judging.

It should be recalled that in the ‘inquisitorial’ criminal process, the investigation is an official inquiry entrusted to public officials—such as investigating judges (e.g. France, Belgium, Netherlands) and/or the public prosecution service (e.g. Germany) jointly with the police—who are obliged to investigate impartially and objectively. They must execute investigative actions for the collection of both inculpatory and exculpatory evidence equally. The parties’ role in the pre-trial stage is essentially limited to filing requests for investigative action intended to move investigating authorities to pursue a certain line of inquiry. The totality of evidence collected by investigating authorities proprio motu and based upon the requests, is brought into the single case file (dossier) that plays the central role during the trial. In the modernized ‘inquisitorial’ process, the principles of adversarial hearing (le principe du contradictoire) and immediacy and orality (die Unmittelbarkeit und Mündlichkeit des Verfahrens) prevent trial judges from relying directly and exclusively on the written evidence from the dossier for the purpose of judgment, but it is common practice to read its portions out in court, in addition to hearing the accused, witnesses, and experts. Given the presumption that all relevant evidence in the case is already on the dossier, the parties seldom request the additional evidence to be called. The typical absence of a thorough defence investigation and the strong alternative version of facts that could inform the decision as to the guilt or innocence, results in a weaker contradiction between the parties, less competitive proof-taking, and limited incentives for the court to induce the parties to cooperate in order to narrow down the issues in dispute.

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8 See further Chapter 4.
10 E.g. Art. 81 Code of Criminal Procedure (France, Code de procédure pénale, CPP).
During the trial, a judge is mandated to conduct truth-finding and is the ‘master’ of the dossier, which entails an unfettered discretion with regard to what evidence to examine and what (additional) witnesses to call. For example, the evidentiary role of defence counsel in French criminal trials is to reinterpret the facts and evidence in the dossier in the light favourable to the client, to search for a ‘plausible explanation’, or to reveal inconsistencies or ambiguities in the dossier, as opposed to presenting the results of an independent partisan investigation. Evidence brought in on a defence lawyer’s initiative will more likely go towards mitigation of sentence rather than innocence. The deficit of procedural contradiction would also make it unnecessary for the prosecution to adduce significant volumes of new evidence. Somewhat differently, in Germany, defence lawyers tend to play a more adversarial role at trial in actively challenging incriminating evidence, although the presiding judge retains full control over the course of the proceedings and interrogates witnesses and experts. These characteristics of ‘inquisitorial’ systems invalidate or at least reduce the relevance of the concern that parties may adduce considerably more evidence than needed for the resolution of the case. Pre-trial access of judges to evidence is conducive to streamlining the trial. The managerial concerns are ubiquitous and not unknown to Continental systems, given the need to effectively process the caseload. There, case-management powers inhere in the judges’ truth-finding function, but the exercise of such powers remains subordinate to the ultimate goal of the search for the truth. A failure to examine material evidence would be inconsistent with the judicial epistemic duties. In ‘inquisitorial’ systems, managerial judging is subsumed within the truth-finding functions of the court and constrained by that goal.

By contrast, at common law, parties have powers and capacity to conduct their parallel investigations and to secure evidence that favours their respective cases. Each case is thoroughly prepared by a party and presented in a contest-styled trial before a passive adjudicator of facts (jury) not previously involved with evidence, ‘only partially informed and innocent of details’. The lack of prior knowledge of the case on the part of the trier-of-fact is an indication and guarantee of impartiality and fairness. Counsel enjoy considerable freedom in formulating and presenting their cases as they see fit. Since there are limited incentives for them to limit their presentation to strongest evidence, counsel may be tempted to swamp significant amounts of evidence upon the jury, particularly in complex cases. Indeed, a judge will exercise control over the evidence by filtering out inadmissible items. Moreover, jury in itself is a disciplining factor because the parties know that jurors might ‘sanction’ counsel who adduce excessive amounts of evidence. But in systems which

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13 Ibid., at 309-10 (due to their limited knowledge of the dossier, French defence lawyers may be cautious to make requests for investigative action, because the uncertainty about facts, otherwise beneficial to the client, could be resolved contrary to his interests).

14 Art. 238(1) StPO. See e.g. Frase and Weigend, German Criminal Justice (n 9), at 342; W.T. Pizzi, ‘The American “Adversary System”’, (1998) 100 University of West Virginia Law Review 847, at 848.


16 Ibid., at 297 and 316 (‘an effective inquisitorial tradition based on judicial supervision of police investigations was vulnerable to bureaucratic pressures to process large volumes of cases, even if there was a cultural commitment to seek out exculpatory evidence as well as inculpatory evidence.’).

17 E.g. Art. 244(2) StPO (‘The court shall, in order to determine the truth, extend the taking of proof ex officio to all facts and evidence relevant to the decision.’).


19 Yuil v. Yuil [1945] 1 All ER 183 (CA) 189 (‘the judge who himself conducts the examination …descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.’).

20 A. Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’, in B. Swart et al. (eds), The Legacy of the International Criminal Tribunal for the Former Yugoslavia (Oxford: Oxford University Press, 2011) 96 (‘the presence of a jury can serve as a moderating and even disciplining influence in reducing the
allocate strong partisan roles to counsel and reserve a passive position for fact-finders, these circumstances do not neutralize the risk of ‘adversarial excesses’ responsible for excessively lengthy and inefficient process that is sub-optimal for the purpose of establishing the truth.

It is with view to combatting the ‘adversarial excesses’ that court practices were adopted in some common law jurisdictions that aimed at engaging judges in the pre-trial management of cases.\(^{21}\) It will not skip one’s attention that granting judges a more active role in the early stage of a case and encouraging them to obtain advance knowledge of the evidence is at odds with both the traditional adversarial ideal of adjudicator as a \textit{tabula rasa} and the notion that each party should exercise full procedural autonomy over the content and scope of her case. The managerial role of a judge entails that the defence may be requested and expected to disclose elements of its case even before the prosecution evidence is heard. From an undiluted adversarial perspective, this is apt to cause tensions with the right to remain silent and the allocation of the burden of proof on the prosecution. Given their inconsistency with the premises of an adversarial trial system, managerial judging practices have understandably been attended by controversy and resistance from within the system.

In the United States, managerial judging became a typical feature of civil law litigation, but it appears to have had limited effects on criminal procedure.\(^{22}\) Other common law countries had their own experiences of moving criminal process in the ‘managerial judging’ direction. These domestic developments constitutes a useful backdrop to the subsequent discussion of similar reforms embarked upon by the \textit{ad hoc} tribunals in 1997-1998 and the managerial model generally, inasmuch as it has been embraced by all international and hybrid criminal courts. A wide variety of forms of judicially supervised pre-trial case management can be found in common law (and mixed) jurisdictions such as England and Wales (pre-trial reviews in magistrates’ courts and plea and directions hearings in Crown Courts), Scotland (intermediate diets in Sheriff Courts), Canada (pre-trial conferences in the Ontario Court of Justice; case conferences and directions hearings in Victorian County Courts; contest mention hearings in Victorian Magistrates’ Courts), New South Wales (pre-trial hearings in the Supreme Court), and New Zealand (status hearings for summary proceedings and call-overs for indictable proceedings).\(^{23}\) A closer look at one of these jurisdictions gives an idea about the purposes and operation of managerial courts.

In England and Wales, managerial reforms of criminal procedure were partially inspired by respective changes in civil litigation that are comparable to those which occurred in the US. The Woolf Report issued in 1996 triggered the shift towards a new policy which endowed judges with the function of pro-actively managing civil suits by way of setting a timetable, deciding on the procedure, notifying of the costs, and ruling on the evidence to be heard.\(^{24}\) The recommendations contained in the report purported to make the civil process less ‘adversarial’ as a way to reduce the costs and alleviate the burden on the courts.\(^{25}\) Eventually,

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\(^{21}\) J.D. Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?’, (2005) 68(5) \textit{Modern Law Review} 737, at 738 (‘Trends away from adversary excesses in certain common law countries ... have been said to include greater judicial management over the criminal process’).


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the trend spilled over to criminal adjudication practice.26 The 1993 Report of the Runciman Commission recommended to provide for a more expansive role of trial judges before the commencement of the trial; in complex cases this would include holding preparatory hearings with an objective to identify contested matters, decide on the admissibility of evidence, and to rule on a broad range of household issues related to expeditious case-disposition.27 The Criminal Procedure and Investigations Act (1996) introduced plea and direction hearings in Crown Courts at which each party must inform the court of the number of witnesses, the admitted facts, and the agreed evidence.28 Under Criminal Procedure Rules (2005), ‘plea and case management hearings’, serving the purposes of trial-preparation and fixing the trial date, are to be held by Crown Courts to enable the court to obtain detailed information from the parties as to their witnesses, including defence witness whose written statements are accepted, admitted facts, alibi, disputed issues of law, and special testimonial arrangements required.29 Furthermore, as a way to facilitate the court’s managerial work, a ‘case progression officer’ shall be appointed whose task is to monitor compliance with the management directions, to be a link between the court and the parties, and to be readily accessible for them via telephone or email.30 The court’s power to give direction to the parties to ensure their trial-readiness is given teeth by it authority to specify ‘the consequences of failing to comply with a direction’, i.e. penalize a party who fails to comply.31

One problem with the managerial court practice concerned the need to ensure continuity in the handling of the case throughout the consecutive phases of the proceedings. The plea and case management hearings held for the purposes of clarifying issues and preparing the case for trial must preferably be convened by the same judge who will try the case.32 Since in rare case does the same judge conduct both pre-trial hearings and the trial, a legislative measure was taken to make pre-trial decisions binding on the trial judges, unless a party shows a material change of circumstances.33 According to McEwan, this proved unhelpful, however, given that a trial judge would have no prior knowledge of the case; rather, continuity could effectively be provided in the proceedings conducted by a single justice of the peace or by a magistrates’ clerk.34 The enforcement of the managerial model was inhibited due to practitioners’ resistance, as it clashed with the adversarial philosophy of lawyers that was deeply entrenched in the legal culture and professional upbringing.35 As will be seen, this is a useful lesson that is directly relevant to the success of the ‘managerial judging’ reforms at the international criminal tribunals.

Another striking feature of the managerial court system operating in England and Wales, as noted above, is that particularly in complex cases some of the trial-preparation related functions of the judges are delegated to non-judicial officers of the court (magistrates’ clerks). The ever expanding list of their managerial duties has included giving directions for

28 J. McEwan, ‘Co-operative Justice and the Adversarial Criminal Trial’ (n 26), at 172.
30 Rule 3.4 Criminal Procedure Rules 2005 (England and Wales). Additionally, the court may assign a judge, magistrate, or clerk to manage a case: see Rule 3.5 Criminal Procedure Rules 2005 (England and Wales).
31 Rule 3.5 Criminal Procedure Rules 2005 (England and Wales). See Darbyshire, ‘Criminal Procedure in England and Wales’ (n 29), at 97 (characterizing this power as controversial).
32 McEwan, ‘Co-operative Justice and the Adversarial Criminal Trial’ (n 26), at 172-3.
33 Ibid., at 173, n12 (reporting that only 7% of cases are handled by the same judge during pre-trial and trial stages).
34 Ibid.
35 Ibid. (noting that ‘the legal profession itself must be radically overhauled in terms of its structure and organisation before any semblance of rationality or efficiency in the criminal justice system can be achieved.’)
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the conduct of trial, scheduling, pre-trial work with the parties, receiving filings and summaries of legal arguments relied on by the parties, the determination of a manner in which the evidence is to be presented, and so on. The merging of the quasi-judicial and administrative support or advisory functions in an increasingly powerful figure of a clerk has been regarded by commentators as a controversial development. The underlying argument was that case management is a properly judicial rather than administrative work and must not be outsourced to non-judicial officers. In the words of the Lord Chief Justice Lord Bingham, ‘If the justice’s clerk were to be entrusted with these important decisions and judgments, judicial in character, the time would inevitably come when people would reasonably ask whether he or she should not be left to get on and try the whole case’. The controversy around the phenomenon of an expanding role of magistrates’ clerks provides an interesting angle on the ICTY practice to delegate some of the pre-trial judge’s case-management functions to a Senior Legal Officer (SLO) that will be discussed in the following section.

3. PREPARATION FOR TRIAL BEFORE INTERNATIONAL CRIMINAL TRIBUNALS

3.1 IMT and IMTFE

In the IMT and IMTFE, the involvement by judges in the proceedings in the lead up to trial was virtually non-existent. Nor were these historical tribunals availed of a pre-trial judicial function embodied in a pre-trial chamber or judge. At the Nuremberg Tribunal, pre-trial proceedings were subject to limited regulation: Article 14 of the Charter merely set out the functions of the ‘Committee for the Investigation and Prosecution of Major War Criminals’ which was composed of the four chief prosecutors appointed by the signatory states. The Committee’s job was to approve the indictment along with the accompanying documents and to lodge the indictment and the documents with the Tribunal; no judicial review of indictments was foreseen. Thus, even the basic function of confirming the charges was not in the hands of the judges. Neither the Charter nor the Rules of Procedure foresaw any form of judicial supervision over pre-trial disclosure of materials between the parties. The Nuremberg judges had no role in safeguarding the defendant’s rights in the pre-trial phase. The standards governing procedures before the Tokyo Tribunal were essentially similar. At Nuremberg, it was also a prerogative of Chief Prosecutors, not that of the judges, ‘to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial’.

The lack of judicial involvement prior to the trial limits any discussion on the intermediate judicial phase in the IMT and IMTFE. Essentially, Rule 7 of the IMT Rules of Procedure and Article 10 of the IMTFE Charter on pre-trial motions are the only provisions

37 Ibid., at 186 (case management is ‘part of judges’ inherent common law power to control the proceedings before them’) and 187 (the delegation of judicial functions to clerks is ‘an unprincipled, undesirable development of the clerk’s role’; ‘Calling a judicial act “administrative” does not make it any the less judicial’).
38 Ibid., at 188 (citing House of Lord Debates, 16 December 1997, col. 562).
39 Art. 14(c) IMT Charter.
40 See Rule 2(a) IMT RPE.
41 Boister/Cryer, The Tokyo International Military Tribunal 75 (criticizing as ‘highly prejudicial for the accused’ the lack of judicial supervision over investigative activities, which were ‘purely executive processes’ in the IMTFE context).
42 Art. 15(f) IMT Charter.
that address that phase. This explains the limited degree to which the Nuremberg and Tokyo IMTs were concerned with the need to ensure the expeditiousness of the trials ex ante. That said, the IMT still had to deal with ‘a very large number of applications by the defendants’ counsel for witnesses and documents’. Thus, defendant Sauckel requested the court to present fifty-five witnesses, which led to the prosecution circulating a special memorandum pleading the court to limit the number of witnesses. The IMT stated in this connection in its judgment that ‘[i]t was … necessary to limit the number of [defence] witnesses to be called, in order to have an expeditious hearing, in accordance with Article 18 (c) of the Charter. The Tribunal, after examination, granted all those applications which in its opinion were relevant to the defense of any defendant or named group or organization, and were not cumulative.’

Hence, the managerial concerns were not extraneous to the IMT and IMTFE. The latter court, for instance, heard no less than 419 witnesses. But mostly, the respective task was to be carried out by the judges in the course of the trial by ‘confin[ing] the trial strictly to an expeditious hearing of the issues raised by the charges’ and by ‘tak[ing] strict measures to prevent any action which will cause reasonable delay, and rul[ing] out irrelevant issues and statements of any kind whatsoever’. The emphasis on the power to manage the conduct of trial and its active exercise by the bench during the proceedings, as opposed to the approach of strictly limiting parties in the presentation of their cases in anticipation of the trial, tends to fit in the ‘adversarial’ design of the IMT and IMTFE trial scheme. At the dawn of international criminal justice, the length of trials did not pose any extraordinary challenges and was reasonable in the circumstances, given the number of defendants and the novelty of the undertaking.

### 3.2 ICTY, ICTR, and SCSL

#### 3.2.1 Introductory remark

As explained above, the discussion of the stage that precedes the ‘trial’ in the ICTY, ICTR and SCSL regimes in the present context is warranted by a number of reasons. First, as follows from the structure of the RPE, some of the procedural measures taken prior to trial formally fall beyond ‘pre-trial proceedings’ and, arguably, could be regarded as introductory elements of the ‘trial proceedings’, with view to their clearly preparatory nature. This in particular appears to be the case with Pre-Trial Conferences at the ICTR and SCSL. Moreover, the Pre-Defence Conference before the three tribunals takes place after the Prosecution rests its case and before the Defence case starts. Hence, despite their pre-trial and

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43 Art. 10 IMTFE Charter (‘Applications and Motions before Trial’) (‘All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.’).
48 Art. 18(a) and (b) IMT Charter; Art. 12(a) and (b) IMTFE Charter.
49 The trial of the 22 major war criminals before the IMT was completed in less than one year (21 November 1945 – 1 October 1946); the Tokyo trial of 28 defendants lasted for longer – over 2 years (3 May 1946 – 12 November 1948).
50 Note that Rule 73bis (‘Pre-Trial Conference’) and 73ter (‘Pre-Defence Conference’) of the ICTR and SCSL RPE are contained in Part Six (‘Proceedings before Trial Chambers’) of the Rules, whereas the respective ICTY Rules in Part Five (‘Pre-Trial Proceedings’).
preliminary function, those Conferences fall squarely within the temporal framework of the ‘trial proceedings’. In a similar vein, the functions of the ICTY pre-trial Judges in the preparation of Pre-Trial and Pre-Defence Conferences are spread over both pre-trial and trial stadia, whilst the meetings between the parties and the pre-trial Judge pursuant to Rule 65ter of the ICTY Rules may be held not only before those Conferences but also during the trial itself.\(^{51}\) This warrants the consideration of the preliminary proceedings in the present context.

Second, the inclusion of the preliminary steps notwithstanding the fact that some of them formally fall within the pre-trial process at the ICTY, provides a comparative vantage point for studying equivalent procedures at all three courts based on the ICTY model, in which the same procedures are treated as part of the trial stage. For instance, the Status Conferences, clearly elements of pre-trial procedure in all three ICTY-modelled courts, are the tools of the trial procedure at the ICC and the ECCC, which employs trial management hearings for similar ends.\(^{52}\) The opportunity to juxtapose one against another the analogous preparatory proceedings in different jurisdictions is sufficiently rewarding to ignore minor differences in their formal temporal distribution and denomination.

Third, and most importantly, the purpose and operative contents of these preliminary steps are intrinsically linked to the conduct of trial and to set a stage for trial. Most measures taken during the pre-trial stage predetermine the issues to be dealt with during trial and are capable of profoundly affecting it, both substantively and procedurally. During the pre-trial stage, the disclosure of evidence between the parties is effected and the evidentiary materials are delivered, in a certain form, to the court, which enables the trial to proceed in a fair and efficient way. Through the prompt resolution of the matters that are disposable and identification of those truly contested between the parties as well as by determining the number of witnesses to be called at trial and time needed for presentation of evidence, these proceedings shape the scope and course of trial.\(^{53}\) It would hardly be an overstatement to aver that the secret of successful—fair and effective—international criminal trials is to a large degree in the quality of preparation for those trials. Thus, the ‘trial’ proper cannot be seriously studied in perfect isolation. Any meaningful discussion of the trial procedure and the applicable law of evidence necessarily falls back on the exposition of pre-trial measures that foreshadow the matters to be pleaded at trial and predefine the character and quantum of proof to be adduced by the parties.

The present Chapter’s approach is predominantly chronological, and the trial-preparatory procedures, whether those pertain nominally to the pre-trial or trial stage, are addressed from that perspective. In contrast with the trial itself, the bulk of pre-trial proceedings is conducted in writing rather than through live process.\(^{54}\) This entails that the examination of the organizational forms of such proceedings rather than their substantive contents will necessarily come to the fore, i.e. the questions are how the preparatory or pre-trial steps unfold and what their place is in the sequence of the proceedings, rather than what is the substance of the matters to be litigated and settled during those steps. The substantive aspects of those steps reflecting the contents of the forms of pre-trial or preparatory work by the parties and/or the court, as promised, will be reserved to the other contexts where that discussion thematically belongs. The following paragraphs are limited to addressing the rationales and applicable procedures for various meetings held between the parties and the judges at in order to prepare the case for trial.

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\(^{51}\) See infra subparagraph 8.2.1.3.B.

\(^{52}\) Regulation 54 of the ICC Regulations of the Court; Rule 79 (7)-(8) ECCC IR.


\(^{54}\) ICTY Manual on Developed Practices (n 6), para. 15.
3.2.2 Initial appearance

Before the ICTY, ICTR and SCSL, the judicial phase of pre-trial proceedings starts shortly after the arrival of an accused to the seat of the court, when the landmark first meeting between the accused, the counsel and the Trial Chamber or a Judge thereof is convened in order to formally charge the accused.\(^{55}\) The earlier involvement by the Judge for the purpose of the confirmation of the indictment pursuant to Rule 47 is episodic, in the sense that it relates more to the investigative phase rather than to setting the stage for trial. The confirmation of indictment in the ICTY, ICTR and SCSL is an \textit{ex parte} (Prosecutor only) procedure and in itself does not guarantee that the trial will indeed be held, given the need to effectuate arrest and transfer of the accused to the Tribunal.

The Rules require that an initial appearance be held without delay (ICTY/ICTR) or ‘as soon as practicable’ (SCSL). In the ICTY practice, it would take a few days, depending on whether the accused arrives over the weekend.\(^{56}\) Before the initial appearance takes place, the President assigns the case to the Trial Chamber that will be responsible for conducting pre-trial and trial proceedings. For the purposes of judicial economy, the power of conducting the initial appearance at the ICTY and ICTR was also vested in the single Judge of the Trial Chamber.\(^{57}\) Indeed, in the \textit{ad hoc} courts’ current practice, the respective functions are mostly exercised by one judge rather than by a full bench.\(^{58}\) Remarkably, such hearings at the SCSL are only convened before a Designated Judge of the Trial Chamber.\(^{59}\) To effect the procedure expeditiously, the Presiding Judge of the Trial Chamber would normally issue four orders: (i) an order designating a judge before whom the initial appearance will take place; (ii) a scheduling order; (iii) an order for release of the audio-visual record and permitting photography; and (iv) order for detention of the accused at the detention unit/facility.\(^{60}\)

The tasks carried out at the initial appearance by the Chamber or the Judge are threefold. The first is that of verifying that the right of the accused to counsel has been secured.\(^{61}\) At the ICTY, the Registrar may assign a duty counsel under Rule 45 (C) to represent the accused at the initial appearance.\(^{62}\) Secondly, the single Judge or Chamber shall read the indictment to the accused in a language he masters and ensuring that he understands it.\(^{63}\) In practice, where the accused is represented and assuming that his defence counsel has already explained the nature of the charges against the accused, the Judges often inquire whether he waives the right to have indictment read to him so as to save time and, if so, provide a summary of charges.\(^{64}\)

The procedures for initial appearance in relation to entering a plea of guilty or not guilty are similar but not exactly the same before the three Tribunals in question. At the ICTY, the accused will be informed that, within thirty days of the initial appearance, he or she will be called upon to enter a plea but that, in case he or she requests, a plea may be entered immediately.\(^{65}\) The mainstream practice has been for the accused before the ICTY to plead

\(^{55}\) Rule 62(A) ICTY RPE; Rule 62(A) ICTR RPE; Rule 61(A) SCSL RPE.

\(^{56}\) \textit{ICTY Manual on Developed Practices} (n 6), at 54, para. 6.

\(^{57}\) Rule 62(A) ICTY RPE (IT/32/Rev. 17, 17 November 1999); Rule 62(A) ICTR RPE (as amended on 21 February 2000).

\(^{58}\) Ibid.

\(^{59}\) Rule 61(A) SCSL RPE (as adopted on 7 March 2003) provided that ‘[u]pon his transfer to the Special Court, the accused shall be brought before a Trial Judge as soon as practicable, and shall be formally charged’ (emphasis added.) In the next version SCSL RPE (1 August 2003), the ‘Trial Judge’ was replaced with ‘Designated Judge’.

\(^{60}\) Ibid.

\(^{61}\) Rule 62(A)(i) ICTY RPE; Rule 62(A)(i) ICTR RPE; Rule 61(A)(i) SCSL RPE (additionally requiring that the Registrar shall be instructed to provide legal assistance to the accused as necessary, unless the accused wishes to represent himself or refuses representation).

\(^{62}\) Rule 62(B) ICTY RPE.

\(^{63}\) Rule 62(A)(ii) ICTY RPE; Rule 62(A)(ii) ICTR RPE; Rule 61(A)(ii) SCSL RPE.

\(^{64}\) \textit{ICTY Manual on Developed Practices} (n 6), at 54, para. 6.

not guilty at the initial appearance. However, it may happen that the issue of the legal representation of the accused has not yet been settled or where the accused and counsel had insufficient time to discuss the charges and determine their strategy in relation to a plea by the date of the initial appearance. In such situations, the entry of a plea at the initial appearance would be inapposite, because the obtaining the advice by counsel on those important matters and the counsel’s attendance at the pleading proceeding are essential. Thus, where the accused decides to follow the avenue of deferring a plea, a further appearance shall be held within thirty days from the initial appearance in order for him to enter a plea on each count; failing that, the Judge (or Chamber) shall enter a plea of not guilty on behalf of the accused.

By contrast, the ICTR and SCSL Rules do not envisage further appearances, and the accused is called upon to enter a plea on each count already at the initial appearance, failing which, a plea of not guilty shall be entered on his behalf by the Judges. Further difference between the ICTY, on the one hand, and the ICTR and SCSL, on the other, is that at the initial appearance, the Trial Chamber or Judge may instruct the Registrar to set dates other that the date for trial, as appropriate; neither the ICTR nor the SCSL Rules make such a provision.

The common point between the three courts is that the consequences of the pleas. If a not-guilty plea is entered, either by the accused or by the Judges on his or her behalf, the Registrar shall be instructed to set a date for trial. Should the accused decide to plead guilty, the course of action will depend on whether the proceedings are conducted by a single judge or by a full Trial Chamber. As was discussed elsewhere, the plea of guilty presents the strongest way for the accused to influence the course of the proceedings, given that it is a waiver of the right to be tried and to defend oneself from accusations and thus to have a trial. Arguably one of the most important decisions that can ever be made in the framework of the proceedings of the case by the persons subjected to those proceedings, it is due to be verified by the entire bench rather than by an individual judge only. Consequently, a plea of guilty may not be received by a single judge, and if that is the plea the accused wishes to enter, it must be referred to the Trial Chamber for examination of its validity.

The initial appearance is the first occasion when the accused is being brought before the court and serves as a forum for the entry of pleas, that is the first opportunity for the accused to express his attitude towards the jurisdiction of the court and the charges laid against him. Thus, this hearing’s symbolic value is difficult to overestimate. Although formally and by nature a part of pre-trial stage, the initial appearance is also milestone in the progression of the proceedings in preparation for the trial. Irrespective of whether or not the plea is actually entered or, as in the case may be at the ICTY, deferred to the further appearance, a number of important deadlines are to be counted down namely from the date of the initial appearance.

Aside from a further appearance to be convened, as mentioned, within thirty days if necessary (ICTY), the examples of the deadlines anchored to the initial appearance, are: (i) at the ICTY, the designation of the pre-trial Judge by the Presiding Judge of the Trial Chamber from among its members, not later than seven days; (ii) at the ICTY, the appointment of permanent counsel for the accused, within 30 days of the initial appearance; (iii) at the

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66 ICTY Manual on Developed Practices (n 6), at 54, para. 7.
67 Ibid.
69 Rule 62(A)(vii) ICTY RPE. Cf. Rule 62(A) ICTR RPE and Rule 61 SCSL RPE.
70 Rule 62(v) ICTY RPE; Rule 62(A)(iv) ICTR RPE; Rule 61(iv) SCSL RPE.
71 For a detailed discussion, see Chapter 6.
72 Rule 62(A)(v)(b) ICTY RPE; Rule 62(v)(a) ICTR RPE; Rule 61(v) SCSL RPE.
73 ICTY Manual on Developed Practices (n 6), at 54-5, para. 7.
74 Rule 65ter(A) ICTY RPE. See further Chapter 6.
75 Rule 62(C) ICTY RPE (in case the accused has not retained a permanent counsel or has not elected in writing to conduct his or her defence in person pursuant to Rule 45(F), the Registrar shall assign one). This Rule was introduced on 12 July 2007 (IT/32/Rev. 40), see Fourteenth Annual Report of the ICTY, UN Doc. A/62/172-S/2007/469, 1 August 2007, para. 29.
ICTY, convening the first status conference, within 120 days;\textsuperscript{76} (iv) at all three courts, the disclosure obligations of the Prosecutor, within thirty days;\textsuperscript{77} and (v) filing of preliminary motions by the Defence, within thirty (ICTY/ICTR) or twenty-one (SCSL) days after the Prosecution’s disclosure is effected.\textsuperscript{78}

\section*{3.2.3 Conferences}

\subsection*{A. Status conferences}

The status conferences are one of the principal and long-lived forms of organizing the pre-trial work of the parties and the Trial Chamber at the ad hoc tribunals and the SCSL. Essentially, these conferences amount to a form of control by the Trial Chamber or a Trial Chamber judge over the progress of pre-trial preparation and the protection of the right of the accused to be tried without undue delay. As regular conferences, their place in the chronology of pre-trial proceedings is after the initial appearance of the accused before the Trial Chamber and prior to setting the date for trial.\textsuperscript{79} At the ICTY and ICTR, these conferences were formally introduced in the pre-trial proceedings with the insertion of Rule 65\textit{bis}, respectively in 1997 and 1998.\textsuperscript{80} This legislative measure merely codified the earlier developed practice, as by then status conferences were no outright novelty. For example, ‘closed session status conferences’ had routinely been held in the Tadić case, in order to discuss a broad range of procedural matters: disclosure, translation of documents, use of courtroom technology for display of exhibits, practical measures for protected witnesses, financial arrangements for the defence counsel, readiness for trial, difficulties with conducting investigations, various matters regarding witness (live as well as video-link) and expert testimony, and so on.\textsuperscript{81} The practice was continued in Aleksovski before it found way into the Rules.\textsuperscript{82}

The initial version of the ICTY Rule 65\textit{bis} stated that ‘[a] meeting known as a status conference may be convened by a Trial Chamber or a Trial Chamber Judge. Its purpose is to organize exchanges between the parties so as to ensure expeditious preparation for trial.’\textsuperscript{83} The analogous ICTR Rule authorized a Trial Chamber or a Judge to convene such a conference, with its purpose being somewhat differently formulated as ‘to organise exchanges between the parties so as to ensure expeditious trial proceedings’.\textsuperscript{84} Thus, this language might be interpreted as suggesting that whereas at the ICTY the status conferences had been conceived as a tool of speeding up \textit{pre-trial} proceedings, at the ICTR their primary professed

\textsuperscript{76} Rule 65\textit{bis}(A) ICTY RPE.

\textsuperscript{77} Rule 66(A)(i) ICTY and ICTR RPE (duty to disclose to the Defence copies of the supporting material which accompanied the indictment when the confirmation was sought and prior statements obtained from the accused); Rule 66(A)(i) SCSL RPE (duty to disclose to the defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92\textit{bis} at trial).

\textsuperscript{78} Rule 72(A) ICTY, ICTR and SCSL RPE; Rule 72(A) SCSL RPE

\textsuperscript{79} Decision on the Defence Motion for Disclosure of Evidence, \textit{Prosecutor v. Niyitegeka}, Case No. ICTR-96-14-I, TC II, ICTR, 4 February 2000, para. 17 (‘even if Article 62 states that, after the initial appearance of the Accused, the Registry should set a date for trial, the practice of the Tribunal has evolved; a status conference is usually organised after this initial appearance to decide if it is possible to set a date for trial’).

\textsuperscript{80} See Chapter 6.

\textsuperscript{81} Opinion and Judgment, \textit{Prosecutor v. Tadić}, Case No. IT-94-1-T, TC II, ICTY, 7 May 1997, paras 11, 19-25; Third Annual Report of the ICTY, UN Doc. A/51/292-S/1996/665, 16 August 1996, para. 43 (‘Prior to the commencement of the trial, a number of closed session status conferences were held with the parties to determine readiness for trial.’).

\textsuperscript{82} Fourth Annual Report of the ICTY, UN Doc. A/52/375-S/1997/729, 18 September 1997, para 46 (stating that a status conference was held in that case a little more than one month after the initial appearance). See also A. Rodrigues, ‘Undue Delay and the ICTY’s Experience of Status Conferences: A Judge’s Personal Annotations’, in J. Doria \textit{et al.} (eds), \textit{The Legal Regime of the International Criminal Court} (Leiden/Boston: Martinus Nijhoff, 2009) 216, who notes that in Aleksovski, the Chamber and the parties employed frequent meetings to openly and actively discuss and seek agreement on various factual and legal issues, which presaged the status conferences.

\textsuperscript{83} Rule 65\textit{bis} ICTY RPE (IT/32/Rev. 11, 25 July 1997).

\textsuperscript{84} Rule 65\textit{bis} ICTR RPE (as amended on 8 June 1998).
goal was to shorten trials. This finds confirmation in how the ICTR Judges perceive the purposes of holding status conferences.\(^{85}\)

The ICTY Rule was amended on five occasions since, with a major amendment occurring in December 1998. The change introduced then was twofold. First, a requirement was inserted that a Trial Chamber or Trial Chamber judge shall convene a status conference within 120 days of the initial appearance of the accused and not less than every 120 days thereafter. Second, the Status Conferences were endowed with an additional function – to review the status of the case and provide the accused with an opportunity to raise issues in relation thereto, including his or her mental and physical condition.\(^{86}\) As reported, the reform towards making the status conferences periodic and mandatory as well as the attribution to them of the said monitoring function was triggered by the death of two accused in the UN Detention Unit within short period in 1998, one of whom had suffered from depression and committed suicide.\(^{87}\) It was believed that holding regular meetings between the parties and the Judge to review the status of the case and to monitor the health condition of the accused would enable to move pre-trial preparation forward, to minimize delays, and to prevent such tragic incidents from occurring in the future. While holding regular status conferences with a frequency less than required by the Rule is precluded, they may well be held more often in case there are new developments to be addressed or in the final stage of preparation for trial.\(^{88}\) By comparison, to date, the ICTR judges have neither incorporated the temporal requirement into the Rule 65\(^{bis}\) nor provided for mandatory status conferences.\(^{89}\) Nor have they amended Rule 65\(^{bis}\) to include the review of the status of the case and consideration of the state of health of the accused as a raison d’être of the status conferences.

The subsequent amendments of the ICTY Rule 65\(^{bis}(A)\) were motivated by the institutional reforms like the arrival of ad litem judges and their allocation to the pre-trial work.\(^{90}\) In November 1999, the ICTY Rule was further amended to obligate the Appeals Chamber or Judge to convene status conferences within 120 days of the filing of a notice of appeal or within 120 days from the last status conference, to give the accused an opportunity

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85 E.g. Interview with Judge Egorov, ICTR, ICTR-PJ/06, 20 May 2006, at 4 (describing status conference as ‘an important landmark in a case, because these conferences give an opportunity to coordinate the parties’ activities’ and to monitor ‘the status of preparation of a case – witnesses for the prosecution, the degree of accomplishment of the required procedures such as the exchange of information, furnishing of documents and whatever else is prescribed under the Rules.’); Interview with Judge Emile Francis Short, ICTR, ICTR-PJ/05, Arusha, 23 May 2008, at 2 (‘During the pre-trial stage, we have status conferences, and during the status conferences we can make any necessary order for the smooth and expeditious conduct of the trial. We make orders as to disclosure, preparation of lists of witnesses, the length of the trial, the length of examination-in-chief, the number of witnesses, the duration of their testimony. In this way, we try to make orders that facilitate the conduct of the investigation and the trial.’).

86 These amendments were agreed at the 19th plenary session held in December 1998 and entered into force on 17 December 1999: see Sixth Annual Report of the ICTY (n 65), paras 109 and 113.

87 These two accused were Slavko Dokmanović (committed suicide in his cell on 29 June 1998) and Milan Kovačević (passed away in detention due to natural causes on 1 August 1998). See Rodrigues, ‘Undue Delay and the ICTY’s Experience of Status Conferences’ (n 82), at 216.

88 See ICTY Manual on Developed Practices (n 6), at 57, para. 15.

89 E.g. Decision on the Defence Motion for the Review of the Decision of 9 May 2000 and for the Scheduling of a Status Conference, Prosecutor v. Nsabimana, Case No. ICTR-97-29A-T, TC II, ICTR, 20 November 2000, para. 14 (emphasizing that ‘it is and remains the prerogative of “a Trial Chamber or a Judge thereof” to decide on and set a date for such a status conference’).

90 Rule 65\(^{bis}(A)\) was further on amended on 12 April 2001 (introducing reference to ‘permanent’ Trial Chamber Judge as opposed to new 27 ad litem judges elected by the General Assembly pursuant to UNSC Res. 1329 (2000) of 30 November 2000 in order to increase ‘trial capacity’; see Eighth Annual Report of the ICTY, UN Doc. A/56/352–S/2001/865, 17 September 2001, paras 4, 10, 13, 190 etc.) and on 17 July 2003 (removing that reference due to the granting of the power to undertake also pre-trial work to ad litem judges: 28th plenary session held in July 2003, see Tenth Annual Report of the ICTY, 20 August 2003, UN Doc. A/58/297-S/2003-829, para. 34).
to raise similar issues.\textsuperscript{91} The ICTR judges followed the suit in July 2002 and included Rule 65bis(B) that empowers, rather than obligates, the Appeals Chamber or its Judge to convene a status conference and stipulates no time limits.\textsuperscript{92} In December 2002, paragraph (C) was added to Rule 65bis of the ICTY RPE, allowing for the possibility of conducting a status conference, provided that the accused has agreed in writing after having received advice from the counsel, (i) in the presence of the accused, but with the counsel participating via tele- or video-conference; (ii) with either counsel or accused participating via tele- or video-conference.\textsuperscript{93} At the ICTR, a similar amendment was made in May 2004, envisaging the possibility of conducting a status conference with the participation of counsel via tele- or video-conference.\textsuperscript{94}

By the time the SCSL Rules were adopted, the \textit{ad hoc} tribunals had refined their Rules on a number of occasions and accumulated certain experience in conducting status conferences, from which the SCSL could benefit. Thus, the initial (March 2003) version of the SCSL Rule 65bis noticeably departed from the respective ICTR Rule. From the outset and until now, the SCSL Rule SCSL RPE has incorporated an additional rationale of the status conference to ‘review the status of [the] case and to allow the accused the opportunity to raise issues in relation thereto’, borrowed from the respective ICTY Rule. Initially, it also incorporated the temporal requirement of having a status conference within 60 days after the initial appearance and as necessary thereafter, but it was expunged in August 2003.\textsuperscript{95} The result is that the current Rule 65bis of the SCSL RPE approximates in language to the ICTR’s Rule 65bis(A), as far as it provides for the power (rather than an obligation of the judges) to convene a status conference and imposes no deadline for doing so. The second and the most recent amendment of the SCSL Rule 65bis was effected on 24 November 2006 following the recommendation by the Independent Expert A. Cassese to ‘explicitly provide for a Status Conference before a single Judge of the Trial Chamber’ and thereby ‘bring the Rule into line with the current practice in the Taylor case’.\textsuperscript{96} For the rest, the SCSL judges have not followed in the footsteps of their ICTR colleagues in amending Rule 65bis, as it does not include paragraphs analogous to Rule 65bis(B) and (C) of the ICTY and ICTR Rules.

The status conferences were conceived as an important procedural device for rushing the development of the case through the pre-trial stage and for expediting trial proceedings. To that end, before Rules 73bis and 73ter were adopted in July 1998,\textsuperscript{97} Rule 65bis, in conjunction with Rule 54, had often been employed to order the parties to submit to the Chamber the witness statements and/or make formal admissions or stipulations within a certain time-limit in advance of trial.\textsuperscript{98} In contrast with the ICTY’s Rule 65ter meetings mostly held before a

\begin{itemize}
\item \textsuperscript{91} As amended on the 21st plenary session. See Seventh Annual Report of the ICTY, 26 July 2000, A/55/777/87, paras 287-306 (no explanation provided for the amendment).
\item \textsuperscript{92} Cf. Rule 65bis ICTR RPE, as amended on 6 July 2002. See Decision on Hassan Ngeze’s Request for a Status Conference, \textit{Prosecutor v. Nahimana et al.}, Case No. ICTR-99-52-A, AC, ICTR, 13 December 2005 (refusing the accused’s request to convene a status conference in order to enable him to address the problems that he allegedly faced at the UNDF for the failure to show ‘that a status conference … would be necessary to ensure expeditious proceedings on appeal in the present case’).
\item \textsuperscript{93} Amended at the 27th plenary session, held in December 2002, see Tenth Annual Report of the ICTY (n 90), para. 33.
\item \textsuperscript{94} Rule 65bis ICTR RPE, as amended on 14 May 2004.
\item \textsuperscript{95} Cf. Rule 65bis SCSL RPE (adopted on 7 March 2003) with Rule 65bis ICTR RPE (as amended on 1 August 2003 at the Third Plenary meeting). See First Annual Report of the President of the SCSL (December 2002 – 1 December 2003), at 12-13.
\item \textsuperscript{97} Cf. Rule 73bis(B)(ii)-(iii) and 73ter(B)(ii)-(iii) ICTY RPE (IT/32/Rev. 13, 10 July 1998).
\item \textsuperscript{98} E.g. Scheduling Order, \textit{Prosecutor v. Mrkšić et al.}, Case No. IT-95-13a, TC II, ICTY, 20 November 1997, at 2 (ordering a status conference with one of the purposes being ‘to consider ordering that the Defence, within a time limit to be set by the Trial Chamber, set out in writing … those points (if any) of the indictment which are
Senior Legal Officer (SLO), status conferences are presided over by one pre-trial Judge or designated Trial Chamber Judge. These meetings are normally public hearings, save for parts reserved for discussion of confidential issues such as witness protection. The trial chambers have been sensitive to the tensions between the preferred public nature of status conferences and their function of resolving pending issues between the parties, which may be easier to attain in camera. Thus, one SCSL Trial Chamber held that 'status conferences are not simply court management matters, but are far more than that' and, in the interests of greater transparency, varied its previous order for a closed session in part the discussion of pending pretrial motions. Normally attended by all parties and the accused, if in detention, they provide a potentially useful forum for resolution of pending matters and clearing the way for the trial to commence. At the ICTY, status conferences frequently take up issues raised at the Rule 65ter meetings. They present the accused with a platform for direct contact with a pre-trial or single Judge and to have him or her address whatever negative effects the long pre-trial detention may have had on the accused. The absence of

admitted; those … which are denied and the grounds for so doing'); Scheduling Order, Prosecutor v. M. Kovačević, Case No. IT-97-24, TC, ICTY, 5 March 1998; Scheduling Order, Prosecutor v. Aleksovski, Case No. IT-95-14/1-PT, TC I, ICTY, 3 December 1997, at 2. See G. Boas, 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', (2001) 12 Criminal Law Forum 41, at 45. 99 ICTY Manual on Developed Practices (n 6), at 56, para. 13, and 61, para. 32. See also Interview with Judge Erik Møse, ICTR, ICTR-PJ/04, 20 May 2008, at 4 (‘in our Chamber, we usually avoid the situation where three judges sit in status conferences. It is generally sufficient that one judge meets with the parties and representatives of the Registry to solve problems that may delay the process.’)

100 Rule 77 ICTY, ICTR, and SCSL RPE (‘All proceedings before a Trial Chamber, other than discussions of the Chamber, shall be held in public, unless otherwise provided.’) and Rule 79(A) ICTY and ICTR RPE (‘The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of: (i) Public order or morality; (ii) Safety, security or non-disclosure of the identity of a victim or witness …; or (iii) The protection of the interests of justice.’). Cf. Rule 79(A)(i) SCSL RPE (‘national security’).

101 See Reasons for Order for Closed Session of the Status Conference and Modification of Said Order in Part, Prosecutor v. Sesay et al., SCSL-04-15-PT, TC I, SCSL, 5 March 2004, at 3 (reserving the issues of disclosure, witnesses, protective measures, points of agreement, and judicial notice for a closed session). The Trial Chamber noted that ‘its decision to hold certain sections of the Status Conference in a closed session was out of an abundance of caution for the following reasons: (i) The closed sessions on the items of the agenda so designated will be more conducive to candid and more open views between the parties. (ii) Unlike the actual trials, status conferences are in essence informal meetings of the parties the objective of which is to identify and resolve mostly the procedural and technical aspects of a trial. (iii) Since most of the factual and legal issues to be deliberated upon at status conferences are still at a preliminary stage, there is a potential that by the premature disclosure of such factual and legal issues the interests of justice and integrity may be jeopardised’. See also Transcript, Prosecutor v. Norman et al., Case No. SCSL-04-14-PT, TC I, SCSL, 4 March 2004, at 7 (ordering closed sessions for the same parts of the status conference).

102 As noted, Rule 65bis(C) ICTY RPE allows, with the written consent of the accused, to conduct status conferences with the counsel and accused participating via tele- or video-conference or in the accused’s absence. See e.g. Scheduling Order for Status Conference, Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-PT, TC III, ICTY, 6 November 2008, at 2 (scheduling a status conference in the absence of the accused, both on provisional release in Serbia). The practice before some other ICTY Chambers was not to hold status conferences when the accused was on provisional release: see Decision on: the Defence Motion to Suspend All Time Limits & Protect the Basic Rights of the Accused; and the Defence Motion for an Extension of Time, Prosecutor v. Strugar, Case No. IT-01-42-PT, TC I, ICTY, 18 September 2003, at 5.

103 Scheduling Order, Prosecutor v. R. Delić, Case No. IT-04-83-PT, TC I, ICTY, 14 May 2007, at 2 (‘a Status Conference is necessary in order to discuss the start and conduct of the trial as well as pending matters’).

104 E.g. Order Scheduling a Status Conference, Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-PT, TC, ICTY, 23 January 2007, at 1 (‘a Status Conference will allow the parties to discuss any issues which have recently been raised by them with the Senior Legal Officer of the Trial Chamber’); Transcript, Prosecutor v. Orio, Case No. IT-03-68-PT, TC III, ICTY, 29 July 2003, at 50-1.

105 Transcript, Prosecutor v. V. Popović et al., Case No. IT-05-88-PT, TC II, ICTY, 4 April 2006, at 81 (Judge Agius indicating that one purpose of a status conference is ‘to give the opportunity to every Accused to come and face-to-face with the Pre-Trial Judge, where issues relating to their mental and/or physical conditions as well as to their state of detention may be freely discussed’); Transcript, Prosecutor v. Đorđević, Case No. IT-05-87/1-PT, TC II, ICTY, 2 November 2007, at 19 (‘detention of persons accused before this Tribunal is subject to
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the latter rationale for the ICTR status conferences may indicate their stronger managerial character; whilst the accused has the right to be present, his participation does not appear strictly necessary.106

B. Rule 65ter meetings (ICTY)

The effects of allocating judges to the pre-trial work and creating the agency of pre-trial Judge at the ICTY could not be felt immediately in 1998, as far as the organisation and length of the pre-trial process is concerned.107 The Report of the Expert Group that reviewed the operation of the ICTY and ICTR, issued in 1999, noted that these measures were but a partial solution to the efficiency problem and recommended the more active exercise of the powers vested in pre-trial Judges, in particular, ruling on ‘other motions’.108 Similarly, one commentator reported that the deferred effects of the advent of pre-trial Judge might have been due to a certain degree of judicial inertia in employing the powers bestowed upon that figure.109 Making the institute of PTJ fully operational necessitated further reforms intended to facilitate and enhance the pre-trial management of cases, among which the provision of additional forms of judicial engagement during this stage. By contrast, no such developments occurred at the ICTR or the SCSL, for the obvious reason that these tribunals had not formally incorporate the institute of pre-trial Judge as the ICTY did in 1998. Rather they contented themselves with the possibility of allocating a designated judge of the Trial Chamber to do a circumscribed range of pre-trial tasks in relation to the Pre-Trial and Pre-Defence Conferences as well as pre-trial motions.110

With a view to intensifying the involvement of pre-trial Judges, ICTY Rule 65ter(D) was amended at the extraordinary plenary session held in April 2001, to envisage that the pre-trial Judge may be assisted in the performance of his or her functions by one of the Senior Legal Officers (SLO) assigned to Chambers.111 This legislative novelty codified the previous practice in the Galić case, whereby certain non-judicial tasks in the preparation of the case had been allocated, with the agreement of the parties, to a Senior Legal Officer working in judicial control, and for that reason we wish to see every four months that the accused is well and alive, and also to raise issues related to the progress of the pre-trial phase of your case’).

106 Judgement, Semanza v. Prosecutor, Case No. ICTR-97020-A, AC, ICTR, 20 May 2005, para. 54 (implicitly acknowledging the right of the accused to be present at status conferences but dismissing as unproven the accused’s claim that the Trial Chamber had denied it to him).

107 On the institute of pre-trial judges at the ICTY, see Chapter 6.

108 Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, 22 November 1999, para. 83 (‘To a limited degree, this [allocation of one Trial Chamber judge to pre-trial work] appears to have been helpful in expediting proceedings. There is, however, a difficulty. The pre-trial judge currently is not empowered to issue rulings in behalf of the Trial Chamber requiring action by the parties. His function seems to be more in the nature of an attempt to persuade them to agree. This however, might change if the judges decide to take a more interventionist role in controlling the proceedings. If so, the pre-trial judge could … under Rule 65 ter (D), act on motions under rule 73. In addition, to the extent not currently being done, the pre-trial Judge could make a pre-trial report to the other judges with recommendations for the pre-trial order establishing a reasonable format in which the case is to proceed.’).

109 See Boas, ‘Creating Laws of Evidence’ (n 98), at 88 (‘The practice of the pre-trial judge prior to the amendments adopted [in November 1999] appears to have been very diverse. Most status conferences in preparation of trials took place before the entire trial chamber, even though it was possible under the pre-amended Rule 65 ter to hold them before the pre-trial judge alone. This can be explained by the trial chambers taking some time to fully utilise the pre-trial judge Rule. The role and impact of the pre-trial judge are in any case not particularly visible at the moment, perhaps partly because the judge is a mere delegate of the trial chamber and is not vested with specific investigative and case management powers (as, for example, are available to the continental investigating judge) to carry out a more aggressive pre-trial preparation.’).

110 See Rules 73, 73bis, and 73ter ICTY and SCSL RPE.

111 Rule 65ter(D)(i) ICTY RPE. See Eighth Annual Report of the ICTY (n 90), para. 52 (‘Under the new regime, Senior Legal Officers in Chambers may assist the Pre-Trial Judge in facilitating a work plan by which the parties will be required to prepare cases for trial. This will include regular meetings between the Senior Legal Officer and the parties to assist them in the fulfilment of their obligations under the rule.’).
close cooperation with the pre-trial Judge. Interestingly, as stated earlier, the Taylor judges at the SCSL, where SLOs were not admitted to directly coordinate the pre-trial work of the parties, employed assistance of the Deputy Registrar in managing some of the meetings. This can be taken as the sign of existence of a sort of proto-65ter meetings in that court.

At the ICTY, the rationale for allowing the PTJs to re-delegate some of their coordination functions to the legal officers was to alleviate their burden of moving the trial preparation forward and to facilitate the efficient pre-trial proceedings. The amended Rule also set forth the duty of the PTJ to elaborate a work plan, providing for the obligations to be met by the parties in preparation of the case for trial and respective deadlines. Further, it set out the forms of coordination to be executed by the SLO under the supervision of the pre-trial Judge. Basically, the timely and smooth implementation of the work plan elaborated by the pre-trial Judge would require the SLO to operate as a proxy of the PTJ in the discussions held between the parties, a connecting link between them, and a catalyst of the inter-party communication.

The primary managerial task incumbent upon the PTJ, drawing upon the assistance of a SLO, is to ensure that the parties timely meet to discuss the outstanding issues in the preparation of the case for trial, namely, the actual and anticipated problems with their respective filings due before the Pre-Trial and Pre-Defence conferences. The PTJ is prescribed to order them to hold special management conferences, dubbed also as ‘Rule 65ter’ meetings, which can be convened inter partes as well as involve a SLO and one or more parties. When ‘65ter meetings’ are convened in the presence of a responsible SLO, the latter officer discharges all the duties accruing to a pre-trial Judge related to the implementation of the work plan for the relevant filings.

As recently reaffirmed by the Trial Chamber, the 65ter meetings ‘are for purposes of effective trial preparation in a context where the parties are encouraged to discuss matters freely without any risk to the safety of witnesses by inadvertent reference to confidential material’. One of their professed aims is ‘to ensure transparency in the trial process, because the parties are encouraged to share information, discuss practical problems that may arise in the course of trial preparation, and find mutually acceptable solutions to such problems’. Given the managerial character of such conferences as opposed to the status

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112 Rodrigues, ‘Undue Delay and the ICTY’s Experience of Status Conferences’ (n 82), at 220.
114 Eighth Annual Report of the ICTY (n 90), para. 58 (‘a more active role by Senior Legal Officers would provide additional time for the judges to conduct judicial activities and thus constitute another way of reducing the length of trials and increasing the efficiency of the work of the Tribunal.’) Cf. Cassese SCSL Report (n 113), para. 104 (‘The burden on the Judge may be reduced by assigning some of the functions of a Pre-Trial Judge to a competent lawyer, even if he or she lacks judicial status.’).
115 Rule 65ter(D)(ii) ICTY RPE.
116 Rule 65ter(D)(iii) ICTY RPE (‘Acting under the supervision of the pre-trial Judge, the [SLO] shall oversee the implementation of the work plan and shall keep the pre-trial judge informed of the progress of the discussions between and with the parties and, in particular, of any potential difficulty. He or she shall present the pre-trial Judge with reports as appropriate and shall communicate to the parties, without delay, any observations and decisions made by the pre-trial Judge.’).
117 The Prosecution is under an obligation to file its pre-trial brief along with the list of witnesses and exhibits within the time-limit set by the PTJ and not less than six weeks before the Pre-Trial Conference (Rule 65ter(D) ICTY RPE). The Defence shall file its pre-trial brief also within the time-limit set by the PTJ and not less than 3 weeks before the said Conference (Rule 65ter(F) ICTY RPE), whereas the defence list of witnesses and exhibits is to be filed after the close of the prosecution case and before the Pre-Defence Conference (Rule 65 ter (G) of the ICTY RPE). For details, see Chapter 6.
118 Rule 65ter (D) (iv)-(v) ICTY RPE.
119 Cf. Rule 65ter(D)(v) with Rule 65ter(D)(iii) ICTY RPE.
120 Order Confirming a Rule 65 ter meeting and Scheduling a Status Conference, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, TC I, ICTY, 19 March 2009 (‘Karadžić Rule 65ter order’), para. 3.
121 Ibid., at 4.
In conducting those meetings, the SLO and the PTJ may draw upon the assistance by the Registry and require a transcript to be made.\(^{125}\) The minutes are normally not public.\(^{126}\) They are only prepared to be provided to the parties confidentially\(^{127}\) and to be included in the complete case file for the Trial Chamber.\(^{128}\) The same is true for all communications between the parties and the PTJ or the Chamber surrounding the 65ter meetings. Keeping them private corresponds to the ‘standard practice for the parties to proceedings before the Tribunal to communicate privately … about routine administrative matters’, and enables to ‘most effectively and expeditiously prepare the case for trial without clogging the trial record with routine administrative correspondence.’\(^{129}\) However, the 65ter transcripts may also be made publicly available if the Chamber orders so, and there indeed have been such precedents.\(^{130}\)

The ICTY Rules prescribe neither the usual timing nor regular intervals for the ’65ter meetings’, but in practice they proved to be most useful when convened shortly before and in preparation of status conferences.\(^{131}\) As follows from the Rules, the same meetings are to be convened after the trial proceedings have commenced: for example, Rule 65ter(D)(iv)-(v) authorizes the PTJ and the SLO to ensure that the Defence complies with its filing obligations pursuant to paragraph G and Rule 73ter after the prosecution closes its case and prior to the Pre-Defence Conference.\(^{132}\) Moreover, those meetings can also be held, as appropriate, \textit{in the course of the proof-taking phase of trial}, albeit subject to the requirement of compelling

\begin{itemize}
\item \(^{122}\) Rule 65ter(D)(v) ICTY RPE. See ICTY Manual on Developed Practices (n 6), at 57, para. 14 (‘If the accused is representing himself, his presence at the meetings is required, but most cases involving self-representation include greater emphasis on dealing with issues in the more formal setting of the status conferences.’) See also Karadžič Rule 65ter order (n 120), para. 6 (‘while the Chamber notes the Accused’s expressed reluctance to attend any such Rule 65 ter meeting, it wishes to leave him in no doubt that the decision to hold them is not his, and that his attendance is in his own interests and is expected.’).
\item \(^{123}\) Rule 65ter(I) ICTY RPE (‘In order to perform his or her functions, the pre-trial Judge may proprio motu, … hear the parties without the accused being present … in his or her private room, in which case minutes of the meeting shall be taken by a representative of the Registry.’).
\item \(^{124}\) Karadžič Rule 65ter order (n 120), para. 3 (‘Meetings held within the terms of Rule 65 ter are generally conducted in private, in a conference room, and do not form part of the trial process.’); M. Harmon, ‘The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials: A Potential Unrealized’, (2007) 5 JICJ 277, at 397 (‘Rule 65ter conferences normally occur in a private conference room and, although the proceedings are recorded, they tend to be less formal affairs where the parties and an SLO are in a position to communicate in a more relaxed atmosphere.’)
\item \(^{125}\) Rules 65ter(D)(vii) and (I) ICTY RPE.
\item \(^{126}\) ICTY Manual on Developed Practices (n 6), at 57, para. 14.
\item \(^{127}\) Karadžič Rule 65ter order (n 120), para. 3.
\item \(^{128}\) Rule 65ter(L)(i) ICTY RPE.
\item \(^{129}\) Karadžič Rule 65ter order (n 120), para. 7 (rejecting the accused’s request to prepare Rule 65 ter meetings by way of publicly filed documents).
\item \(^{130}\) Karadžič Rule 65ter order (n 120), para. 4. See e.g. in the same case, Order Arising from Rule 65 ter Meeting, 2 April 2009, para. 6; Order Arising from Rule 65 ter Meeting, 22 June 2009, para. 2; Order Arising from Rule 65 ter Meeting, 20 August 2009 (ordering disclosure to the public of the corrected transcript of the 65 ter meetings).
\item \(^{131}\) ICTY Manual on Developed Practices (n 6), at 57, para. 14; M. Harmon, ‘The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials: A Potential Unrealized’, (2007) 5 JICJ 277, at 387. See decisions cited in n 104 and Karadžič Rule 65ter order (n 120), para. 4 (‘the Chamber considers that such status conferences are likely to be more productive if they are conducted after a Rule 65 ter meeting has been held, which has been the routine practice in other cases at this Tribunal.’); Transcript, Prosecutor v. Mrkšić, Case No IT-95-13/1-PT, TC II, ICTY, 5 March 2003, at 44.
\item \(^{132}\) For example, two 65ter meetings were scheduled in the pre-defence phase of the Prlić \textit{et al.} case; see Decision on Motion for Extension of Time for the Commencement of the Defence Case and Adopting a New Schedule, Prosecutor v. Prlić \textit{et al.}, Case No. IT-04-74-T, TC III, ICTY, 28 January 2008, at 6.
\end{itemize}
practical necessity due to the strong preference for the trial hearings to be conducted in public. In the Stakić case, the Trial Chamber held eleven meetings with the parties during the trial, applying Rule 65ter(I) by analogy.

This is as far as the procedure applicable to the ‘65ter conferences’ goes, but what about the way how this procedural device has shown itself in the practice thus far? The predominant scheme under which the SLO presided over 65ter conferences to oversee the execution of the work plan and mediate between the PTJ and the parties, was severely criticized by a number of practitioners. Their claim was that it had contributed little to producing informal exchanges and agreements between the parties and largely failed to identify issues not genuinely in contest and to expedite the process. With the same result, those meetings could be replaced by the parties providing written reports, because ‘there [was] absolutely no effort made to engage the parties to resolve their differences or to tackle head-on matters that could directly shorten the trial.’ The practice of the judges conceding the discharge the bulk of the 65ter duties to their SLO and keeping a certain distance from the parties, had a chilling effect on the preparedness of the latter to resolve outstanding pre-trial issues by consensus and to jointly seek for constructive solutions. As observed by the insiders, the SLOs were too often perceived as lacking sufficient authority to propel agreements between the parties, which rendered 65ter meetings in the presence of the SLO mere rehearsals of status conferences or meetings convened by the PTJ. Gradually, the realization came that the degree of direct involvement by the Judges in 65ter conferences and their willingness to actively work with the parties in the resolution of the outstanding issues prior to trial is a key prerequisite for the success of those conferences.

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134 Transcript, Prosecutor v. Brdjanin and Talić, Case No. IT-99-36-T, TC II, ICTY, 16 June 2003, at 17581 (Judge Agius responding to the prosecution’s request to hold 65ter meeting as follows: ‘the whole concept of the Rule 65 ter meetings outside and post the pre-trial stage is very much limited. So in order to grant a 65 ter meeting, I must know precisely what is the purpose of the meeting and – because if the same things can be achieved or discussed in open session, I will have them discussed in open session.’).


137 S. Bourgon, ‘Procedural Problems Hindering Expeditious and Fair Justice’, (2004) 2(2) JICJ 526, at 529 (‘Whereas the text of Rule 65ter is, in theory, an ideal plan for the pre-trial phase of the proceedings, in practice the rule has produced, at best, mixed results. The Defence has often been singled out as being responsible for this situation. … Unfortunately, control over the actions of the Prosecution during the pre-trial phase is lacking.’); Harmon, ‘The Pre-Trial Process at the ICTY’ (n 131), at 387 (noting that 65 ter meetings are ineffective, as they ‘tend to be remarkably sterile endeavours wherein the parties merely report to the SLO their progress on the state of their trial preparations and their differences on particular matters.’).

138 Harmon, ‘The Pre-Trial Process at the ICTY’ (n 131), at 387.
In this view, balance had to be rethought between the opposing considerations: the one of judicial economy gained from the delegation of work with the parties to the SLO and the other of the positive effects of the PTJ’s active participation in coordinating pre-trial preparation. In reaction to the April 2006 recommendations of the Bonomy Working Group on Speeding Up Trials, a shift regarding the customary distribution of labour between the PTJs and SLOs started to show—on the official policy level—towards the increased participation and proactive role of pre-trial Judges in the Rule 65 conferences. As the then ICTY President Pocar announced to the Security Council, ‘Judges have reversed the traditional roles of Pre-Trial Judge and Senior Legal Officer in the conduct of Rule 65ter conferences’.139 In result, their participation has conveyed the clear message to the parties that expeditious action is called for in each case, and the Pre-Trial Judge’s pro-activity has increased the prospect of cooperation between the parties.140

However, it was reported that the new policy had not cardinally increased judicial involvement of the judges in the 65ter conferences, and the ‘discredited practice’ of SLOs presiding over the same continued.141 It is likely that in fact, the way of handling rule 65ter process varies from chamber to chamber and is still largely dependent upon occasional factors, among which the view of individual judges on the appropriate degree of pre-trial involvement and the composition of the agenda of a particular 65ter conference. On recent occasions, some Rule 65ter meetings were attended even by all Judges of the Chamber, which may in abstract would seem a slight ‘overkill’ but might well have been justified by the circumstances of the case.142 Thus, the broad judicial attendance at the first such meeting in the Karadžić case was warranted by the need to have ‘a full discussion’ of how Rule 65ter process was to be applied, among other household matters.143

C. Pre-Trial Conference

a. Rationale

Unlike status conferences at the ad hoc tribunals and the SCSL as well as ICTY’s Rule 65ter meetings, the importance of a pre-trial conference exceeds that of a mere routine or regular working meeting, as it amounts to a culmination of the pre-trial stage.144 A procedure that is common to all three courts, it is a one-time mandatory and landmark event held shortly prior to commencement of the trial.145 Although the practice varies greatly depending on the circumstances of each individual case, usually a Pre-Trial Conference is scheduled several days in advance of the date set for the start of trial or, if no issues outstanding for resolution before the commencement of the trial are anticipated, even on the same day of the trial’s opening.146

ineluctably is in a better position to assist the parties to identify bona fide issues in dispute and to assist them in reaching agreements in respect of trial related matters.’).
140 Ibid.
141 Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 389. Confirming this information, see Jørgensen, ‘The Proprio Motu and Interventionist Powers of Judges’ (n 53), at 127.
142 Rule 65ter(M) of the ICTY RPE (‘The Trial Chamber may proprio motu exercise any of the functions of the pre-trial Judge.’).
143 Karadžić Rule 65ter order (n 120), para. 5.
145 Rule 73bis(A) ICTY, ICTR, and SCSL RPE. See also Bonomy, ibid.
146 ICTY Manual on Developed Practices (n 6), at 60, para. 29. See e.g. Order Rescheduling Pre-Trial Conference, Prosecutor v. Lukić and Lakić, Case No. IT-98-32/1-PT, TC III, ICTY, 19 June 2008, at 2 (scheduling the trial to begin immediately after the conference); Scheduling Order for the Pre-Trial Conference and the Commencement of the Trial against Pavle Strugar…, Prosecutor v. Strugar, Case No. IT-01-42-PT, TC I, ICTY, 15 December 2003 (scheduling the trial to commence on the next day following the Pre-Trial Conference). Cf. with Scheduling Order for a Status Conference and Order Recalling the Accused from Provisional Release, Prosecutor v. Stanišić and Župljanić, Case No. IT-08-91-PT, TC III, ICTY, 26 May 2009,
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One of the primary procedural functions of a Pre-Trial Conference is ‘to ensure that the Prosecution’s case is ready for trial and where possible, to schedule the commencement of trial after taking into consideration the reasonable requirements of the Defence’.\(^{147}\) Pre-trial conference is a phase of critical importance not only for the pre-trial but also for the trial phase, because the measures taken by the Chamber then to a large extent pre-determine the scope of the forthcoming trial.\(^{148}\) During a pre-trial conference, or as a result thereof, the Prosecution case can be considerably reduced by measures such as shortening the estimated length of examination-in-chief of some of witnesses;\(^ {149}\) limiting the number of witnesses to be called by the Prosecution and the total time needed for the case presentation;\(^ {150}\) fixing a number of crime sites or incidents comprised in one or more of the charges that are representative thereof; and, exceptionally (at the ICTY only), directing the Prosecutor to select the counts in the indictment to go on trial.\(^ {151}\) Besides, it enables the Trial Chamber to address the pending last-minute issues on the eve of the trial.\(^ {152}\)

The chronology of, and the reasons for, adopting Rule 73(bis), first at the ICTY on 13 March 1998 and then at the ICTR on 8 June 1998, and subsequent amendments thereto, have been discussed earlier in detail and need not be reproduced here.\(^ {153}\) Suffice it to remind that, after and aside from the insertion of these more detailed provisions on pre-trial process, the procedural and institutional aspects of the pre-trial stage have evolved relatively independently at the two ad hoc courts, while the SCSL Judges could pick from their progressive features and innovative procedures whatever they regarded useful and appropriate in that Court’s circumstances. The fact that the amendments introduced in the Rules of the ICTY, ICTR and SCSL were not fully identical could not be without consequences for the operative contents and actual role of Pre-Trial Conference, on which the three tribunals vary \textit{inter se}.

One difference noted earlier between the ICTY and the ICTR runs along the existence of the institute of Pre-Trial Judge and, more importantly, the temporal concentration of the duties of the parties to make their pre-trial filings either in the period before the Pre-Trial Conference or in its aftermath.\(^ {154}\) According to the current ICTR Rule 73bis, whose relevant paragraphs mirror the original ICTY Rule, the Trial Chamber or designated Judge will employ that Conference as a forum: (i) to order the Prosecutor to file, within a time limit and before the date set for trial, a pre-trial brief, admissions by the parties, a statement of contested matters, witnesses and exhibits lists, and, remarkably, copies of written statements of each witness, and (ii) to order the Defence to file a statement of admitted factual and legal points and a pre-trial brief.\(^ {155}\) The responsible Judges would normally have no access to all these materials ahead of that Conference, although indeed Rule 73bis does not preclude the parties and, in particular, the Prosecutor, from filing the pre-trial brief materials prior to the

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\(^{148}\) Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 388; \textit{ICTY Manual on Developed Practices} (n 6), at 60.

\(^{149}\) Rule 73bis(B) ICTY RPE; Rule 73bis(C) ICTR RPE; Rule 73bis(C) SCSL RPE.

\(^{150}\) Rule 73bis(C) ICTY RPE; Rule 73bis(D) ICTR RPE; Rule 73bis(D) SCSL RPE. Unlike the ICTY Rules, the ICTR and SCSL Rule 73bis does not explicitly allow the Chamber to determine the time available to the prosecutor for the presentation of evidence.

\(^{151}\) Rule 73bis(D) and (E) ICTY RPE.

\(^{152}\) \textit{ICTY Manual on Developed Practices} (n 6), at 60, para. 29.

\(^{153}\) See Chapter 6.

\(^{154}\) \textit{Ibid}.

\(^{155}\) Rule 73bis(B) and (F) ICTR RPE. Cf. Rule 73bis(B) and (F) ICTY RPE (IT/32/Rev. 13, 10 July 1998).
Conference or before the order to that effect.\textsuperscript{156} Hence, under the present terms of the Rule, the managerial measures of shortening the length of examination-in-chief of witnesses or reducing their number (Rule 73bis(C) and (D) of the ICTR RPE) can be reasonably expected to be performed on the Prosecution case not at the Conference but, if deemed necessary, later during the trial. In the actual ICTR practice the Judges have used other avenues to get hold of the said materials before a Pre-Trial Conference, for example, by using Status Conferences for ordering the submission thereof.\textsuperscript{157} It is indeed another matter whether the ICTR judges have been using those materials to determine the scope of the case to be heard as actively as their ICTY colleagues.

By contrast, an ICTY Trial Chamber will already be in possession of the pre-trial files of both parties and other materials submitted by the PTJ pursuant to Rule 65 ter(L)(i) of the ICTY RPE already by the time of the Pre-Trial Conference. Moreover, oftentimes at least some decisions aimed at narrowing down the Prosecution case will have already been taken by the Pre-Trial Judge himself in the preparation for that Conference. Obviously, this has been the consistent trend of the amendments to Rule 73bis providing for stricter and earlier deadlines for the parties’ pre-trial submissions.\textsuperscript{158} This has also been the primary logic of the professed ICTY policy of enforcing those deadlines earlier in time, to ensure that the pre-trial briefs, statements of contested and uncontested matters, and witness and exhibits lists are furnished as early as possible in the pre-trial proceedings.\textsuperscript{159} Similarly, since 13 May 2006, the SCSL Rule 73bis grants the Chamber the power to order the parties to make their filings under Rule 73bis(B) and (F)—which are more limited than the ICTY Pre-Trial Judge’s file though—prior to the Pre-Trial Conference. Therefore, the present pre-trial regime at the SCSL in this respect is closer to the ICTY rather than ICTR approach. Owing to these features, the Pre-Trial Conferences at the ICTY (and, potentially, the SCSL) will per se be focused, to a greater extent than at the ICTR, on narrowing the Prosecution case by the Chamber, as a host of administrative matters like the submission of pre-trial briefs, admissions and stipulations and witness/exhibit lists will have been cleared prior to the Conference. Consequently, the Trial Chambers at those tribunals will be better placed to take critical managerial decisions affecting the scope of the case and thus the length of trial, prior to the trial.\textsuperscript{160} This interpretation is confirmed by a dictum of the ICTY Appeals Chamber in

\textsuperscript{156} See Decision on Defence Motion to Strike the Prosecutor’s Request to Augustin Ngirabatware to Admit Facts Pursuant to Rule 73bis(B)(ii) of the Rules, Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, TC II, ICTR, 26 March 2009, para. 9. The ICTR rejected the defence argument that the prosecutor’s request to the defence pursuant to Rule 73bis(B)(ii) ICTR RPE, to specify which facts it would admit and which it would refute, was premature because it had been made prior to the Pre-Trial Conference: ‘Indeed, the wording of Rule 73bis(B) of the Rules stipulates that at the Pre-Trial Conference, the Trial Chamber “may” order the Prosecution to file admissions by the Parties. This implies that such admissions can also be filed prior to a Pre-Trial Conference and that the Trial Chamber can subsequently note those admissions during the Pre-Trial Conference. The Trial Chamber considers that such an approach is in line with the Accused’s right to an expeditious trial...’. See in the same case, Decision on Defence Motion Objecting to the Prosecution’s Pre-Trial Brief, 2 June 2009 (‘Ngirabatware I prosecution pre-trial brief decision’), para. 24 (‘Rule 73bis does not set a specific filing time limit for the pretrial brief, and therefore a pre-trial brief may be filed prior to a Pre-Trial Conference’).

\textsuperscript{157} Supra n 85.

\textsuperscript{158} See Chapter 6.

\textsuperscript{159} A visible policy shift seems to have occurred in view of the recommendations contained in the final report of the Bonomy Working Group on Speeding Up Trials. See e.g. ICTY Completion Strategy Report of May 2006 (n 137), para. 20 (noting that in Prlić et al. and Milutinović et al. cases, ‘[t]he Pre-Trial Judges have requested earlier production from the Prosecution of the final version of its pre-trial brief... By requiring earlier production of such information, the Pre-Trial Judges in these multi-accused cases have gained a much greater understanding of the Prosecution’s case allowing for more efficient management of the proceedings.’), 23 (‘To engage the Defence more fully in this streamlining process, the Working Group recommended requiring the Defence to file its pre-trial Brief much earlier than previously practiced.’).

\textsuperscript{160} Cf. Boas, ‘Creating Laws of Evidence’ (n 98), at 87 (observing that the provision by the PTJ of a case file forms ‘the basis of orders from the trial chamber for the prosecution or the defence to reduce the list of witnesses and/or shorten the examination-in-chief of witnesses’, which ‘in effect gives more “teeth” to a trial chamber’s aggressive case management approach’).
Milošević, to the effect that Rule 73bis power to limit the time available for the prosecution case does not formally apply during the trial proceedings but only in relation to the Pre-Trial Conference.\footnote{Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, Prosecutor v. S. Milošević, Case No. IT-02-54-AR73, AC, ICTY, 16 May 2002 (‘Milošević time limit appeal decision’), para. 10 (‘Rule 73bis(E)—which concerns the Pre-Trial Conference—could not have been the source of the power during the trial to limit the time for the prosecution case. The order made by the Trial Chamber was made in the exercise of its power to control the proceedings currently being tried before it, which is no different in its relevant aspects from the power identified in Rule 73bis(E).’).}

b. Pre-trial filings

Intrinsically related to the timing for the submission by the parties of their pre-trial briefs and other materials, another important comparator is the volume of material the parties may be ordered to submit to the Judge or the Chamber responsible for the conduct of pre-trial process prior or at the Pre-Trial Conference. The scope of information to be disclosed during pre-trial stage to the Judge and the other party is a factor that predetermines the possible (and expected) degree of judicial managerial intervention in the cases projected by the parties. It is also relevant to assessing the extent to which the preparation of cases for trial amounts to a Judge- or party-driven activity.

The rationale for the filings of the Prosecution and the Defence on the eve or after the Pre-Trial Conference can, relatively uniformly for the ICTY, ICTR and SCSL, be described as providing the Chamber (and the other party) with sufficient information and timely notice on the contents of the respective party’s case.\footnote{Cf. Decision on the Applications Filed by the Defence for the Accused Zejinil Delalić and Esad Landžo on 14 February 1997 and 18 February 1997 Respectively, Prosecutor v. Delalić et al., Case No. IT-96-21-PT, TC II quater, ICTY, 21 February 1997, para. 8 (‘Pre-trial briefs assist the Chamber and the parties in acquiring a general picture of the case to be presented. Pre-trial briefs address mainly questions of law’).} The underlying purpose is to enable the Judge to effectively verify whether the size of the case as projected by the parties, especially the Prosecutor, is reasonable or whether it can be reduced any further.\footnote{J.R.W.D. Jones and S. Powles, International Criminal Practice (Oxford: Oxford University Press, 2003) 693, para 8.5.489 (‘The point of the prosecution filing a pre-trial brief, and the defence setting out with which matters it takes issue in the brief, is to define the issues in dispute before trial in order to avoid evidence being unnecessarily called in respect of matters not in dispute.’); Decision on Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief, Prosecutor v. Taylor, Case No. SCSL-03-1-PT, TC II, SCSL, 5 March 2007 (‘Taylor defence pre-trial brief decision’), at 4 (citing ibid.).} The volume of information that can be deemed sufficient at this early stage depends on what party is concerned; it also varies from tribunal to tribunal. One common principle is that the filing obligations of the Prosecutor and Defence in connection with that Conference are not symmetrical.\footnote{Decision on Prosecution’s Response to ‘Defendant Brdanin Pre-Trial Brief’, Prosecutor v. Brdanin and Talić, Case No. IT-99-36-PT, TC II, ICTY, 14 January 2002 (‘Brdanin pre-trial brief decision’), para. 2; Decision on Prosecution’s Motion for Relief Pursuant to Rule 65 ter (F), Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-PT, TC II, ICTY, 10 October 2005 (‘Mrkšić et al. Rule 65ter(F) decision’), para. 3.}

This asymmetry is the corollary of the fact that in the ICTY, ICTR and SCSL, the presentation of evidence at trial largely follows the adversarial model and is split into two cases, whereby the Prosecutor presents its case first as the party bearing the burden of proof, while the case for the accused comes second as a response to the accusations. In view of this sequence, in order to be able to effectively manage the scope of the case going on trial, it is more urgent for a Judge or the Chamber to obtain access to the relevant information on the Prosecution case. At the pre-trial stage, the Defence may know neither what exactly the case against the accused is nor what its own case is going to be; it is an aspect of the right to silence that it may not be expected to disclose the details of its case other than general contours of its strategy. Hence the volume of the material to be provided by the Prosecution in
connection with the Pre-Trial Conference, as well as the level of detail, is noticeably higher than for the Defence submissions.\footnote{\textit{W.A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone} (Cambridge: Cambridge University Press, 2007) 406.}

Understandably, the purposes and contents of the parties’ filings at this stage are not the same either. The Prosecution’s pre-trial brief and accompanying material, over and above the disclosure obligations pursuant to Rules 66-68 must be sufficiently extensive and detailed to enable the Defence to prepare its case, and for the Pre-Trial Judge or Chamber to effectively perform managerial powers upon it.\footnote{\textit{Decision on the Joint Defence Motion for an Update of the Prosecution’s Pre-Trial Brief, Prosecutor v. Bagosora et al.,} Case No. ICTR-98-41-T, TC I, ICTR, 2 November 2004 (‘Bagosora et al. prosecution pre-trial brief decision’), para. 5 (‘the purpose of the Pre-trial Brief is to notify the Accused and their Counsel of the nature of the testimony witnesses will give so that they can prepare for the examination’); \textit{Decision on Bicamumpaka and Mugenzi’s Motion for Specificity in the Pre-Trial Brief, Prosecutor v. C. Bizimungu et al.,} Case No. ICTR-99-50-T, TC II, ICTR, 24 November 2004 (‘C. Bizimungu et al. prosecution pre-trial brief decision’), para. 30 (‘The analysis of the case in the Pre-Trial Brief by the Prosecutor serves as a tool for the Defence to properly anticipate the evidence, adequately prepare for the cross-examination of witnesses, and for effective preparation to meet the case against the Accused person. It also serves to guide the Chamber through the case, although it is not bound by the information contained in the Pre-Trial Brief in its eventual evaluation of the evidence against the Accused.’); \textit{Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura)…, Prosecutor v. Brima et al.,} Case No. SCSL-04-16-T, TC II, SCSL, 5 August 2005 (‘Brima et al. witness Bangura decision’), para. 19 (‘The provisions of rule 73 bis (B) …are amongst others intended to put the Defence and the Trial Chamber on notice as to the number of witnesses the Prosecution intends to call and the substance of their evidence in relation to the indictment. This is in addition to the Prosecution’s disclosure obligations pursuant to Rules 66, 67 and 68 of the Rules. The overall rationale for such early disclosure is to afford the Defence sufficient time to prepare their defence as well as to ensure an orderly and expeditious trial.’).}

By contrast, the Defence submissions at the Pre-Trial Conference stage is merely a response to the prosecution’s pre-trial brief that is to give sufficient notice to the Prosecutor and the Chamber on the content of the Defence case before the start of trial; it is to set some general boundaries for the trial prior to its commencement and to identify potential areas of agreement between the parties.\footnote{\textit{Reasons for Decision on the Accused’s Request to File a Pre-Trial Brief, Prosecutor v. Šešelj,} Case No. IT-03-67-PT, TC I, ICTY, 22 November 2006, para. 8 (‘The purpose of a Defence pre-trial brief is to enable the Chamber and the Prosecution to have sufficient notice of the content of the Defence case before the presentation of evidence at trial begins’); \textit{Brdanin pre-trial brief decision} (n 164), para. 2 (‘the defence pre-trial brief is primarily intended to be a response to the prosecution’s pre-trial brief and should set some general boundaries for the trial prior to its commencement. In particular, it is a tool for identifying areas of possible agreement between the parties so that the trial may be conducted as efficiently as possible’); \textit{Decision on Prosecution’s Motion for Relief Pursuant to Rule 65 ter (F), Prosecutor v. Mrkšić et al.} (n 164), para. 3; \textit{Order to the Defence to Supplement the Pre-Trial Brief Pursuant to Rule 65 ter (F), Prosecutor v. Stanišić and Župljanin,} Case No. IT-08-91-PT, TC III, ICTY, 9 July 2009 (‘Stanišić and Župljanin order to supplement pre-trial brief’), at 3 (‘the Defence is required, before the opening of the trial, to disclose the general nature of its case, to identify with some specificity the disputed issues which have to be litigated at trial and to set forth the reason for its objections’ and ‘the purpose of Rule 65 ter (F) is to give the Trial Chamber and all other parties to the proceedings sufficient notice of the nature and approach of the challenge that will be raised during the conduct of the Prosecution’s case so as to enable the Trial Chamber, in the interests of justice and to facilitate expeditiousness of the trial, to better control the proceedings and focus the trial on the disputed issues’); \textit{Decision on Prosecution’s Response and Motion for Clarification on Defence Pre-Trial Brief, Prosecutor v. Lukić and Lukić,} Case No. IT-98-32/1-PT, TC III, ICTY, 15 May 2008 (‘Lukić defence pre-trial brief decision’), para. 5 (‘The purpose of this provision is to enable the Trial Chamber and the Prosecution to have sufficient notice of the contents of the Defence case before the presentation of evidence at trial begins.’). Cf. \textit{Taylor} defence pre-trial brief decision (n 163), at 4 (‘the Defence Pre-Trial Brief is primarily a response to the Prosecution case as set out in the Indictment. Case Summary and other materials disclosed to the Defence by the Prosecution under the Rules and is only to a limited degree contingent upon the Prosecution Pre-Trial Brief’).} The Defence will be expected to submit a document whose level of detail approximates that of the Prosecution pre-trial brief only after the Prosecution rests its case and before the opening of the case for the
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With that in mind, it is worthwhile to provide a cross-tribunal comparison of the composition and volume of pre-trial submissions by the parties to the bench.

Different formal requirements apply to the Prosecutor's pre-trial brief at the ICTY, ICTR and SCSL. At the ICTY, the Prosecutor must file, within the time-limit set by the PTJ and not less than six weeks before the Pre-Trial Conference, the final version of the pre-trial brief. The Prosecutor's brief must be quite detailed and include, for each count: (i) a summary of the evidence to be brought relating to the crime and the alleged form of responsibility; (ii) any admissions by the parties and a statement of matters not in dispute; (iii) a statement of contested matters of fact and law. Such admissions are expected to arise from the pre-trial consultations intended to narrow down the scope of contest, held between the parties under the authority of pre-trial Judge.

By contrast, in line with the initial ICTY Rule 73 bis(B), the Prosecution pre-trial brief at the ICTR and SCSL, to be filed within the set time-limit and before the trial, must address 'the factual and legal issues', whereas the admissions by the parties and a statement of other matters not in dispute as well as a statement of contested matters of fact and law do not formally make the part of pre-trial brief and are to be filed as separate accompanying documents. The ICTR jurisprudence clarifies, in particular, that the indictment remains the primary accusatory instrument, and the Prosecution pre-trial brief is only valid as far as 'it develops such strategy in accordance with the Indictment'.

The ICTY Prosecutor's list of witnesses, filed alongside the pre-trial brief, must be as specific as to indicate: (a) the name or pseudonym of each witness; (b) a summary of the facts on which each witness will testify; (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count; (e) an indication of whether the witness will testify in person or pursuant to Rule 92 bis or Rule 92 quarter by way of written statement or use of a transcript of testimony from other proceedings; and (f) the estimated length of time

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168 Brcdanin pre-trial brief decision (n 164), para. 4; Decision on Prosecution's Motion for Relief Pursuant to Rule 65 ter (F), Prosecutor v. Mrkić et al. (n 164), para. 3.

169 Rule 65ter(E)(i) ICTY RPE.

170 As a result of the 12 April 2001 rule amendment, the latter two documents were re-qualified from separate items into the constituent elements of the pre-trial brief. Rule 65ter(E)(i) ICTY RPE (IT/32/Rev. 20, 12 April 2001). The previous version of this Rule, prescribed that the Prosecution's pre-trial brief must address 'the factual and legal issues, including a written statement setting out the nature of his or her case' (Rule 65ter(E)(i) ICTY RPE (IT/32/Rev. 17, 17 November 1999)). The initial version of this requirement in Rule 73 bis(B)(i) ICTY RPE (IT/32/Rev. 13, 10 July 1998) only specified that the brief must address 'the factual and legal issues'.

171 ICTY Manual on Developed Practices (n 6), at 57, para. 17.

172 Rule 73bis(B) ICTR and SCSL RPE.

173 Decision on Defence Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-PT, TC I, ICTR, 30 September 2005, para. 2; Ngitabatware I prosecution pre-trial brief decision (n 156), para. 31 ('the indictment is the primary accusatory instrument, and ... any other accusatory instrument cannot add charges or material facts amounting to charges that were not plead in the indictment.') and, in the same case, Decision on Defence Motions Objecting to the Prosecution's Pre-Trial Brief, Prosecutor v. Ngitabatware, 25 June 2009 ('Ngitabatware II prosecution pre-trial brief decision'), para. 31.

174 The requirement of 'specific references to counts and paragraphs in the indictment was added in Rule 65ter(E)(iv)(c) ICTY RPE (IT/32/Rev. 17, 17 November 1999) (and not on 12 April 2001, as the ICTY RPE indicate). Cf. Rule 73bis(B)(iv)(c) ICTY RPE (IT/32/Rev. 13, 10 July 1998) ('the points in the indictment as to which each witness will testify').

175 This requirement was inserted as Rule 65ter(E)(ii)(d) ICTY RPE (IT/32/Rev. 20, 12 April 2001); cf. Rule 65ter(E)(iv) ICTY RPE (IT/32/Rev. 17, 17 November 1999).

176 The initial version of this requirement was inserted as Rule 65ter(E)(ii)(e) ICTY RPE (IT/32/Rev. 20, 12 April 2001) ('an indication of whether the witness will testify in person or pursuant to Rule 92 bis by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal'); cf. Rule 65ter(E)(iv) ICTY RPE (IT/32/Rev. 17, 17 November 1999). Following the amendments of 13 September 2006, whereby Rules 92ter and 92 quart er were adopted (IT/32/Rev. 39), Rule 65ter now mentions this mode of evidence-taking (the evidence of a person in the form of a written statement or transcript who is unavailable).

177 ICTY RPE (IT/32/Rev. 20, 12 April 2001).
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required for each witness and the total time estimated for presentation of the Prosecutor’s case.\footnote{By the 12 April 2001 amendment, this item was moved from (d) to (f) position, following the insertion of what now are lit. (d) and (e) of Rule 65ter(E)(ii) ICTY RPE.} In order to ensure a better organisation of this massive information in the Prosecutor’s submission for it to serve its purposes of facilitating the Defence’s preparation and of aiding the Judges in the exercise of their pre-trial powers, some ICTR Chambers have requested the submission of a ‘proofing chart’ – an inventory of the items of evidence associated with respective portions of the indictment.\footnote{ICTY Manual on Developed Practices (n 6), at 58, para. 18 (‘Such a chart essentially catalogues the evidence to be presented according to which portion of an indictment it purportedly supports. Proofing charts provide an effective way to assist the Trial Chamber in exercising its powers during the Pre-Trial Conference. It also enables the Defence to get a better understanding of the case against it.’) See e.g. Order on Guidelines for Drawing Up the Lists of Witnesses and Exhibits, Prosecutor v. Prič et al., Case No. IT-04-74-PT, TC III, ICTY, 30 November 2005.} The corresponding Rule 73bis(B)(iv) of the ICTR and SCSL RPE is identical. The ICTY interpreted the provision for filing of the exhibits list in that Rule as requiring that the exhibits themselves should be filed and disclosed to the Defence by the Prosecution, at least by the time it files its pre-trial brief.\footnote{Cf. Rule 73bis(B)(iv) ICTR RPE and the same SCSL Rule: ‘(a) The name or pseudonym of each witness; (b) A summary of the facts on which each witness will testify; (c) The points in the indictment on which each witness will testify; and (d) The estimated length of time required for each witness.’} Thus, at the ICTR and SCSL, the Prosecutor is not required to supply information on the total number of witnesses and the number of witnesses who will testify against each accused and on the manner in which each witness shall testify.

The third set of documents the ICTY Prosecutor is due to submit prior to the Pre-Trial Conference, is the list of exhibits that he or she intends to offer stating where possible whether the defence has any objections as to authenticity, and the copies thereof must be served on the Defence.\footnote{Cf. Rule 73bis(B)(iv) ICTY RPE (IT/32/Rev. 13, 10 July 1998).} Save for the latter requirement, the corresponding Rule 65ter(E)(iv) ICTR and SCSL RPE is identical. The ICTY interpreted the provision for filing of the exhibits list in that Rule as requiring that the exhibits themselves should be filed and disclosed to the Defence by the Prosecution, at least by the time it files its pre-trial brief.\footnote{Rule 65ter(E)(iii) ICTY RPE. On 12 April 2001, this item on exhibits was renumbered as (iii), because the paragraphs (ii) and (iii) of the previous version of Rule 65ter(E) ICTY RPE (IT/32/Rev. 17, 17 November 1999) were transferred to paragraph (i), in result of which the contents of the pre-trial brief were expanded by admissions by the parties and statements of matters of law and fact, contested as well as uncontested (Cf. Rule 65ter(E) ICTY RPE (IT/32/Rev. 20, 12 April 2001). The second sentence, imposing an obligation on the prosecutor to serve on the defence copies of the listed exhibits, was added on 13 December 2001 (IT/32/Rev. 22).} The issue of specificity of the information accompanying the Prosecution witness and exhibit lists has recurrently come to the fore in the ICTR proceedings, as the Defence successfully complained of defects such as, for instance, the missing indication of the paragraphs in the indictment to
which the witnesses were to testify. In Ngirabatware, the Trial Chamber held that the proper submission of the details required by Rule 73bis, serves not only to pay due respect to the right of the accused to be informed of the nature and cause of the charges as guaranteed in Article 20 (4) (a) of the Statute but also ‘permits the Defence to have adequate time and facilities for preparation, inasmuch as knowledge of the areas about which a witness will testify is necessary in order to adequately prepare for cross-examination.’

The overview of the prosecution submissions due prior to or in connection with the Pre-Trial Prosecutor are more extensive and subject to more detailed regulation than for similar filings of the Prosecutors at the other tribunals. However, the ICTR and SCSL Rule 73bis(B) contains a clause authorizing the Chamber or the Judge to order the Prosecutor to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call. Despite the absence of the provision to the same effect in the ICTY RPE, as even early cases evince, the ICTY Trial Chambers have developed the practice of requesting the Prosecution witness statements in advance of trial. These would be filed not as admitted evidence but merely as materials enabling the bench to better comprehend the nature of the respective party’s case and forthcoming live witness testimony and to exercise its managerial duties.

While the disclosure of the copies of all witness statements whom the Prosecutor intends to call to testify at trial (and other statements) is provided for in the Rules, the power to order delivery to pre-trial Judge or Chamber the witness statements has proven to be controversial and was challenged at both the ICTY and ICTR by the parties. This comes as no surprise given that a common-law view militates against prior access by the trier of fact to the prejudicial information, as it is believed to inevitably affect impartiality. For example, in Akayesu (thus before Rule 73bis was introduced at the ICTR), the Prosecutor requested the Trial Chamber to rescind its order to submit copies of all the written witness statements disclosed to the Defence, among others arguing—unsuccessfully—that it constituted ‘an

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183 C. Bizimungu et al., prosecution pre-trial brief decision (n 166), paras 34-5 (‘the Prosecution should comply with its undertaking to file a Pre-Trial Brief which includes the points of the Indictment on which each witness would testify. The Prosecution should not be permitted to resile from its undertaking, even at this stage.’).
184 Ngirabatware II prosecution pre-trial brief decision (n 173), paras 30 and 35. See also Decision on Defence Motions of Nsengiyumva, Kabili, and Ntabakuze Challenging the Prosecution’s Pre-Trial Brief and on the Prosecutor’s Counter-Motion, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 23 May 2002, para. 12 (the Prosecutor’s compliance with Rule 73 bis implies that the Accused was properly informed of the anticipated evidence relating to specific allegations).
185 Rule 73bis(B) (last sentence) ICTR RPE was added during the 8th plenary on 26 July 2000; the corresponding provision was incorporated in the SCSL RPE during the 5th plenary on 29 May 2004.
186 Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 59), at 304 (noting that although Rules 73bis and 73ter represent a ‘scaling back’ of the early practice in Dokmanović to request full statements of witnesses the parties intend to call, as opposed to summaries, the practice of doing so continued).
187 A. Orie, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC’, in Cassese/Gaeta/Jones (eds), The Rome Statute 1465 n108 (‘In the ICTY practice, copies of statements instead of summaries of facts on which the witnesses would testify were sometimes ordered to be filed … and were indeed filed.’).
189 Rule 66(A)(ii) ICTY, ICTR, and SCSL RPE.
190 Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 59), at 304 (the practice of producing factual summaries and witness statements ‘undermines the Trial Chamber’s ability to approach the adjudication of guilt from a “clean slate” point of view’ and is ‘wholly at odds with the concept of adversarial judicial impartiality’).
unwarranted deviation from the established sequence of presentation of evidence’ and was prejudicial for the parties.\(^1\)

A more fundamental and pointed challenge to the judicial power to order delivery to the Judges of witness statements disclosed to the Defence (and exhibits to be tendered at trial) was brought by the Defence in the ICTY’s Blagojević et al. case. While the Prosecution did not object to effecting such disclosure, the Defence was strongly opposed to it, because, in its view, such a request: (1) implied the existence of a prerogative not envisaged in the Rules; (2) impinged upon the Prosecution’s discretion to select the materials to be adduced as evidence; (3) amounted to a take over by the judges of the investigative functions; (4) gave the Chamber access to the materials which the Defence has not had an opportunity to object to or comment on, which may be irrelevant, inadmissible or prejudicial; and (5) violated the rights of the accused, e.g. the right to be presumed innocent and the right to cross-examination.\(^1\)

The Trial Chamber dismissed the challenge, emphasizing the hybrid nature of the ICTY proceedings.\(^1\) The Chamber’s reasoning confirmed its previous view that the prior review of those materials ‘shall promote more effective management of the trial, in assisting the Trial Chamber to make decisions in the course of the proceedings including … the length of examination-in-chief or cross-examination for a particular witness’, provided that they ‘will not be regarded as evidence … unless and until submitted and admitted in the course of trial’.\(^1\)

The matter reached the Appeals Chamber, as Blagojević and Jokić Defence filed an appeal, complaining, among others, that, by requesting the delivery of the witness statements rather than mere summaries specified in Rule 65ter(E)(ii), the Trial Chamber exceeded its authority under the Rules, placed ‘undue emphasis’ on the effective management of the trial and thereby assumed ‘the task of filling in the gaps in the Prosecution case’.\(^1\)

The Appeals Chamber dismissed all the grounds of the appeal.\(^1\) First, it was not impressed by the argument that the Trial Chamber had exceeded its competence under the Rules. The appellate bench held that ‘this new practice, which serves the mandate of the Tribunal and conforms to the internationally recognized standards, may eventually be reflected in an amendment to the Rules’,\(^1\) and referred to the general authority of PTJ under Rule 65ter(B) to ‘ensure that the

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\(^{1}\) Decision on the Prosecutor’s Motion to Reconsider and Rescind the Order of 28 January 1997, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, TC I, ICTR, 6 March 1997, at 2. In rejecting the prosecutor’s arguments, the TC asserted its authority to request submission of the prosecution witness statements, after the prosecution rests its case and before the defence opens its case, based on Rule 89(B) and 98. This would enable it to address the defence claims alleging contradictions between the statements and ‘to better follow the arguments put forward by the parties and to monitor possible contradictions’. The TC also noted ‘it is certainly not for the Prosecutor to dictate to the Tribunal the circumstances in which the Tribunal may use witness statements, from the Prosecutor or the Defence, to determine the facts of the case.’ See *ibid.*, at 3.

\(^{1}\) Decision on Joint Defence Motion for Reconsideration of Trial Chamber’s Decision to Review All Discovery Materials Provided to the Accused by the Prosecution, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, TC II, ICTY, 21 January 2003, at 3.

\(^{1}\) *Ibid.*, at 4 (‘the Rules of the Tribunal are neither a mere reflection of the “common-law” accusatorial system or the “civil-law” inquisitorial system, nor are their origins predominantly in only one system; rather, the Rules are a hybrid of the two systems, having as their primary purpose “to promote a fair and expeditious trial”’).

\(^{1}\) *Ibid.*, at 4-5. The Chamber also pointed that the said materials shall assist the PTJ in fulfilling his obligations under Rule 65ter and the Trial Chamber in its work under Rule 73bis, including, among others, the determination of the length of the examination-in-chief of some witnesses, number of witnesses to be called, and the total time for the case presentation by the Prosecution.

\(^{1}\) Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions for Reconsideration of Trial Chamber’s Decision to Review All Discovery Materials Provided to the Accused by the Prosecution, and Request for Stay of Execution of Decision, *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, TC II, ICTY, 10 February 2003, at 3.

\(^{1}\) *Decision, Prosecutor v. Blagojević et al.*, Cases Nos IT-02-60-AR73, IT-02-60-AR73.2, IT-02-60-AR73.3, AC, ICTY, 8 April 2003.

\(^{1}\) *Ibid.*, para. 15. The Appeals Chamber went on: ‘To claim that the power to order the delivery of the Disclosure Materials is non-existent because neither the Statute nor the rules expressly provide for it, is not sufficient to establish that there was an error in the Impugned Decision.’
proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.\(^{198}\) Second, the Appeals Chamber found speculative the Defence claim that, upon receipt of the witness statements, the Trial Chamber would engage in the investigation of the case along with the prosecution; in assessing the evidence presented by the parties, it will discharge its own truth-finding mandate rather than prosecutorial responsibilities.\(^{199}\) Third, in rejecting as unsubstantiated the preoccupation that the Trial Chamber would consider the merits of the case on the basis of the materials whose delivery was requested, the appellate instance referred to the trial bench’s acknowledgement that those materials fell short of evidence *stricto sensu*.\(^{200}\) Drawing a parallel with Rule 15(C), which rules out disqualification from the trial or appellate bench of a Judge for the sole reason that he or she has reviewed indictment in the case,\(^{201}\) the Appeals Chamber held that ‘to be exposed to materials yet to be presented in evidence does not necessarily lead to pre-judgement or partiality’, whereas ‘[t]he professionalism of the judges … is a guarantee that the presumption of innocence will be respected’.\(^{202}\)

By contrast to the Prosecutor’s filing duties, the defence submissions prior to the Pre-Trial Conference serve to respond to the pre-trial brief and accompanying materials filed by the Prosecution and are, therefore, of a more limited nature. Rule 65\(\text{ter}(F)\) of the ICTY RPE stipulates that, after the Prosecutor filed the said documents, the pre-trial Judge shall order the Defence to make its respective filing, within a certain time-limit set not later than three weeks before the Conference.\(^{203}\) The ICTY defence pre-trial brief must address the factual and legal issues and include a written statement setting out: (i) in general terms, the nature of the defence advanced by the defence; (ii) the matters with which the accused takes issue in the prosecutor’s pre-trial brief; and (iii) the reasons for disagreement on each such matter.\(^{204}\) The correspondent ICTR and SCSL Rule governing the Defence pre-trial briefs is not as specific; it provides that the Trial Chamber or Judge may order, at or prior to the Pre-Trial Conference the defence, respectively at the ICTR and SCSL, to file—within the time-limit and before the start of trial (ICTR) or not later than seven days prior to that (SCSL)—‘a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues’.\(^{205}\)

As pointed out above, the core of the matter with the defence submissions due prior to or in connection with a Pre-Trial Conference is how much information on the case the accused may reasonably be expected to disclose at that early stage. On the one hand, the defence may be unwilling to put the prosecution on notice as regards the contents of its prospective case in too much detail and to commit itself to a certain strategy, before being given an opportunity to

\(^{198}\) Ibid., at 17.

\(^{199}\) Ibid., at 21-2.

\(^{200}\) Ibid., at 28 and 29. Similarly, in responding to Jokić’s fourth ground of appeal that the review of ‘disclosure materials’ impairs a host of rights provided for by Art. 21(3) and (4) ICTY Statute, the AC reiterated the distinction between the mere review of said materials and the presentation of the materials in evidence at trial. It also underlined that ‘it would be incorrect to suggest that the judges will reach a verdict on the basis of those materials without even hearing th witnesses or having the exhibits tested by the parties, and without even hearing the Defence case.’ (ibid., para. 33).

\(^{201}\) On this point, Rule 15(C) ICTY RPE was amended at the 20\(^{th}\) plenary (IT/32/Rev. 16, 22 July 1999) to provide for non-disqualification of a judge who confirmed the indictment from sitting on the appellate panel and subsequently at the 21\(^{st}\) plenary (IT/32/Rev. 17, 17 November 1999), to disallow disqualification of such judge from the trial bench.

\(^{202}\) Ibid., at 29. See also Decision on Joint Defence Motions..., *Prosecutor v. Blagojević et al.* (n 195), at 6, referring to Decision on the Defence Motion for Withdrawal of Judge Orie, *Prosecutor v. Galić*, Case No. IT-98-29-T, TC I, ICTY, 3 February 2003, para. 8 (‘The Judges of this Tribunal are professional Judges with solid experience in handling information in the criminal legal context and notably distinguishing between facts established at trial and facts derived from elsewhere’).

\(^{203}\) The initial version of Rule 65\(\text{ter}(F)\) ICTY RPE (IT/32/Rev. 17, 17 November 1999) established that the period between the possible deadline for the submission of the defence pre-trial brief and the Pre-Trial Conference was seven days. It was extended to three weeks by the amendment of 12 April 2001 (IT/32/Rev. 20).

\(^{204}\) Rule 65\(\text{ter}(F)(i)-(iii)\) ICTY RPE.

\(^{205}\) Rule 73\(\text{bis}(F)\) ICTR and SCSL RPE.
hear and challenge the prosecution evidence at trial. On the other hand, it may simply deem itself unable to form a concept of its case other than a most general one, due to the pending matters with the Prosecution witness lists and, consequently, the limited ability to anticipate issues that could transpire during the presentation of the Prosecution case. On the other side of the scale are the managerial interest of the court to be able to identify only genuinely disputed matters that will go on trial, and the defence’s ‘obligation to contribute to the success of a fair trial and participate positively at all stages of the proceedings’, which applies among other to Rule 65ter(F) procedure.

Therefore, unavoidably, the sufficient level of detail in the Rule 65ter(F) submissions and the extent of the Defence compliance with the Rule has recurrently been a bone of contention. Often, the prosecution complained, and/or the Chamber found, that the defence’s pre-trial brief is not specific enough and fails to comply with one or more of the limbs of Rule 65ter(F) of the ICTY RPE or Rule 73bis(F) of the ICTR and SCSL RPE. In deciding whether or not the Defence brief satisfies the mandatory parameters, the Chambers have relied on the notion that no notice of the contents, evidence or detailed strategy of the Defence case is required, but the defence is only to set out its case’s nature in general terms. Subject to the specific contents of each individual brief, a sufficient notice may include, for example, ‘a statement of the impossibility for the prosecution to prove allegations beyond reasonable doubt, supplemented by general information on the accused’s alleged position or role’, or a statement of the defence stand on ‘the elements of each crime and each form of liability’ along with ‘the basis for such position’. The exception is a statement of an intention to offer a defence of alibi or other defences such as that of diminished mental responsibility. The early disclosure thereof has been firmly recognized as both obligatory and sufficient for the purposes of the defence pre-trial brief. On the contrary, a ‘sweeping denial of any

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206 See e.g. Lukić defence pre-trial brief decision (n 167), paras 8-9 (the Chamber rules that ‘[t]he fact that there are pending matters concerning the Prosecution’s witness list is no excuse not to be able to give the required notice in this respect’).

207 The ICTY Appeals Chamber interpreted this Defence duty as the obligation to specify in general terms, the nature of the accused’s defence pursuant to Rule 65ter and the duty to notify the Prosecution of the intent to offer an alibi or any special defence: Decision on the Interlocutory Appeal against a Decision of the Trial Chamber, as of Right, Prosecutor v. Brdanin and Talić, Case No. IT-99-36-AR-73.7, AC, ICTY, 6 June 2002 (‘Brdanin and Talić appeal decision’), at 4. See also Decision on Prosecution’s Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii), Prosecutor v. Stanišić and Župljanin, Case No. IT-08-91-T, TC II, ICTY, 12 May 2010, para. 19 (drawing a parallel between Rules 65ter(F), 67(A)(ii), and 90(H)(ii)).

208 E.g. Decision Regarding the Accused’s Pre-Trial Brief, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, TC, ICTY, 30 July 2009 (‘Karadžić pre-trial brief decision’), paras 1 and 4 (the Chamber finding that the accused’s brief ‘does not list the specific matters in the Prosecution’s pre-trial brief with which he takes issue’); Stanišić and Župljanin order to supplement pre-trial brief (n 167), at 2-3 (the Chamber noting that the Defence briefs challenge the factual allegations and the legal assessments thereof without indicating any ‘substantive or tangible reasons’ and finding them in breach of Rule 65ter(F)).

209 Lukić defence pre-trial brief decision (n 167), para. 6; Brdanin pre-trial brief decision (n 164), para. 7; Mrkić et al. Rule 65ter(F) decision (n 164), at 3 (‘The Defence is not required to produce at the pre-trial stage details as to the evidence it intends to adduce in the course of its case.’) and 7 (requiring no disclosure by the Defence of their position regarding the Prosecution expert reports at that stage, because ‘[t]he consideration of the Defence as to whether it can accept one or more of the expert reports, and whether it should cross-examine or challenge the qualifications of one or more of the expert witnesses, will be of material relevance to the issues whether the Defence contests the events forming the crime base of this case.’); Brdanin pre-trial brief decision (n 164), para. 10 (the Defence is not required under Rule 65ter(F) to provide support for its alternative version of events).

210 Lukić defence pre-trial brief decision (n 167), para. 6; Brdanin pre-trial brief decision (n 164), para. 8.

211 Mrkić et al. Rule 65ter(F) decision (n 164), para. 4.

212 Rule 67(B)(i) ICTY RPE; Rule 67(A)(ii) ICTR and SCSL RPE.

213 See further Brdanin and Talić appeal decision (n 207), at 2; Lukić defence pre-trial brief decision (n 167), paras 7-8; Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, Prosecutor v. Halilović, Case No. IT-01-48-T, TC I, Section A, 9 May 2005, para. 9 (‘until the end of the Prosecution’s case, the Defence is not under any obligation to provide the Prosecution with any information that could reveal the strategy of its case—except for “in general terms, the nature of the accused’s defence”, and any special defence listed in Rule 67(A)(i).’).
responsibility for all of the crimes charged in the indictment’ would amount to ‘a mere reiteration of the plea of “not guilty”’ and would not qualify as adequately stating the general nature of the defence.214 Similarly, in relation to the issues of law, a mere statement in the brief that the defence disagrees with the Prosecution’s analysis, without effort to assist it or the Chamber to understand the nature of the legal dispute, falls short of meeting the standard.215

In the cases where the Defence pre-trial briefs were found defective, pre-trial Judges or Chambers have availed of the powers to order the Defence to file a supplement to its brief repairing the identified defects so that it complies fully with the formal requirements.216 On other occasions, the remedy for the Prosecution has been the Chamber’s acknowledgement of the potential for prejudice arising to it from the Defence failure and assurance than any such prejudice could be cured, for instance, by allowing the prosecution to lead witnesses it did not call because of its reliance on the defence’s initial pre-trial brief.217 Comparable to other rules providing for defence obligations, the Trial Chambers have regarded Rule 65 (F) (i) as mandating that the Defence contribute to the success of a fair trial and participate positively at all stages of the proceedings.218

c. Judicial powers
Upon receipt by the Trial Chamber of all of the prescribed filings from the pre-trial Judge (ICTY) or from the parties directly (ICTR, SCSL),219 and having satisfied itself that those comply with the formal requirements as set out above, the Judges may proceed to exercising their substantive managerial duties at the Pre-Trial Conference or in its aftermath. In Chapter 6, a detailed chronology of the amendments to the relevant rules was provided, casting the increase in substantive managerial powers of the judges at the ICTY, ICTR and SCSL in a comparative perspective.220 One needs to recall that in particular, on the basis of the pre-trial materials received, the Trial Chambers may order or call upon the Prosecutor to shorten the estimated examination-in-chief of some witnesses.221 If an excessive number of witnesses are being called to prove the same facts, it may order him to reduce the number of witnesses or, at the ICTY, by itself determine the number of Prosecution witnesses and the total time for the presentation of the Prosecution case.222 At the ICTY, the binding character of the witness lists emerging from the exercise of Rule 73bis (C) is reinforced by Rule 90 (G), which envisages the power of the Chamber to ‘refuse to hear a witness whose name does not appear on the list

214 Stanislić and Župljanin order to supplement pre-trial brief (n 167), at 3.
215 Bradanin pre-trial brief decision (n 164), para. 12 (continuing that ‘[i]t is not to say, however, that it is particularly helpful for either of the parties to go into pages and pages of excessively detailed legal analysis in their pre-trial briefs’).
216 Stanislić and Župljanin order to supplement pre-trial brief (n 167), at 3; Mrksić et al. Rule 65 ter (F) decision (n 164), ‘Conclusion’; Bradanin pre-trial brief decision (n 164), ‘Disposition’.
217 Karadžić pre-trial brief (n 208), paras 1 and 5 (‘if, during the trial, the Accused makes a specific challenge to factual allegations in the Prosecution’s pre-trial brief, which was not heralded in his pre-trial brief and which could not have been reasonably anticipated by the Prosecution, the Chamber may view sympathetically an application by the Prosecution to introduce evidence it had not anticipated presenting, for example, by recalling a witness. … In addition, the Trial Chamber may, in appropriate circumstances, refuse to allow the Accused to lead certain evidence because no proper challenge to the Prosecution’s case has been made in accordance with the Rules.’)
218 Decision on Prosecution’s Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii), Prosecutor v. Stanislić and Župljanin, Case No. IT-08-91-T, TC II, ICTY, 12 May 2010, para. 19 (drawing parallel between Rules 65ter(F), 67(A)(ii), and 90(H)(ii)); Decision on Interlocutory Appeal against a Decision of the Trial Chamber, as of Right, Prosecutor v. Bradjanin and Talić, Case No. IT-99-36-AR73.7, AC, ICTY, 6 June 2002, at 4.
219 Rule 65ter(L)(i) ICTY RPE; Rule 73bis(B) ICTR and SCSL RPE.
220 Chapter 6.
221 Rule 73bis (B) ICTY RPE; Rule 73bis(C) ICTR and SCSL RPE.
222 Rule 73bis (C) ICTY RPE; Rule 73bis(D) ICTR and SCSL RPE.
of witnesses compiled pursuant to Rules 73bis and ter. At the ICTY and SCSL, Trial Chambers may also invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites which are ‘reasonably representative’ of the charges. Even absent the explicit Rule 90(G) power, the witness statements and lists as filed are considered binding, subject to the judicial leave to vary them under Rule 73bis (E).

Lastly, uniquely at the ICTY, the Prosecutor may be directed, after having heard the parties and in the interest of fair and expeditious trial, to select the counts in the indictment on which to proceed.

The rationale behind the Rule 73bis powers discharged by the Trial Chamber at the Pre-Trial Conference (ICTY) or later at trial (ICTR/SCSL) is ‘to allow the Trial Chamber, having regard to all the relevant circumstances, to prevent excessive and unnecessary time being taken by the Prosecution’ as well as ‘to ensure that the prosecution litigated only those issues that are really in dispute and which are necessary to be determined for the purposes of its case’. At the ICTY, the respective managerial competences proved to be highly controversial with the prosecutorial staff and generated some tensions or, as one commentator put it, a ‘battle for power’, between the Chambers and the OTP. At the ICTR and SCSL, the practice on Rules 73bis(C) and (D) of the RPE of the ICTR and SCSL has been significantly more limited and, therefore, met with less controversy. This was due to the more modest managerial competences of the Judges in those two courts, more cautious approach adopted by the Judges in exercising them, and the fact that any such measures were decided upon during the trial and not as early as at the Conference. Moreover, Rule 73bis(G) of the SCSL authorizing the Judges to moderate the charging activity was introduced in 2006 and could only be used in Taylor case, but given that the indictment in that case had already been reduced from 17 to 11 counts, that SCSL Rule remained theoretical. The following discussion focuses therefore on the ICTY jurisprudence.

It is worth starting with the ICTY practice of setting time limits on the prosecution case and limiting the number of prosecution witnesses under Rule 73bis (C) of the ICTY RPE. Although the respective judicial powers were instituted in 1998 with the adoption of original Rule 73bis (C) and (D), the Chambers initially did not seem keen on widely using them, which could be explained by the difficulty of setting credible time or number limits early in the proceedings before the trial. For practical reasons, they rather tended to do so in the course

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223 Rule 90(G) ICTY RPE. The Rule was adopted on 12 April 2001 (IT/32/Rev. 20), see Eighth Annual Report of the ICTY (n 90), para. 52 (referring to the lists compiled pursuant to Rule 65ter, rather than Rule 73bis and 73ter, as the Rule’s text does). The ICTR and SCSL RPE do not contain an analogous provision.

224 Rule 73bis(D) ICTY RPE; Rule 73bis(G) SCSL RPE.

225 E.g. Brima et al. witness Bangura decision (n 166), para. 19.

226 Rule 73bis(E) ICTY RPE. The sub-Rule provides also that ‘[a]ny decision taken under this paragraph may be appealed as of right by the party’.

227 Decision on Application of Rule 73bis and Amendment of Indictment, Prosecutor v. Perišić, Case No. IT-04-81-PT, TC III, ICTY, 15 May 2007 (‘Perišić Rule 73bis decision’), para. 9.

228 Jørgensen, ‘The Proprio Motu and Interventionist Powers of Judges’ (n 53), at 137.

229 Chapter 6. See, however, Letter dated 16 November 2007 from the President of the ICTR, Report on the Completion Strategy of the ICTR, UN Doc. S/2007/676, 20 November 2007, para. 27 (reporting that ‘[w]here appropriate, considering the interests of justice, Trial Chambers have ordered a reduction in the number of witnesses and the time allotted for witnesses to give evidence-in-chief.’)

230 E.g. Order for Reduction of Prosecutor’s Witness List, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 8 April 2003 (propr 235 to 100 witnesses); Decision on Variance of the Prosecution Witness List, Prosecutor v. Karemera et al., Case No. 98-44-T, TC III, ICTR, 13 December 2005 (‘Karemera et al. variance decision’), para. 20 (finding it premature to uphold a defence request to issue order to the Prosecution to reduce its witness list) and Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, 11 December 2006, Case No. 98-44-T, TC III, ICTR, paras 25 and 28 (ordering the prosecution to drastically reduce its 93-name witness list on rape allegations).

of the trial, when hearing evidence, based on the experience gained from the proceedings.

Thus, in many cases, the time limits were imposed or modified after the commencement of the trial not on the authority of Rule 73bis(C) of the ICTY RPE, which only applied to Pre-Trial Conferences, but in the exercise of an ‘inherent power’ to control the proceedings during the course of the trial. Alternatively, when setting the time limits when the trial was already underway, the Chambers have referred to Rule 90(F) which accords trial judges with a power to exercise control over the presentation of evidence as a way to make it effective for the ascertainment of the truth and to avoid needless consumption of time.

Given the substantive similarity of the limit-setting powers exercised during pre-trial and trial proceedings, the distinction between them is theoretical and does not preclude their joint consideration. Furthermore, the two said powers share the same problem if applied in the context of the adversarial process. The approach of limiting the time available for examination-in-chief or cross-examination in advance and in a generalized and mechanistic fashion runs a serious risk of undermining the respective party’s efforts in eliciting the desired information from a witness and rendering the examination inefficient. This explains a resistance by the Prosecutor (and as will be shown below, the defence) to the Chamber’s exercise of its prerogative to set the limits on the time for the presentation of evidence.

For instance, in Galić the prosecution objected to the restriction of the time available for the presentation of the prosecution case-in-chief to a maximum of 280 hours. When the matter came before a bench of three Judges of the Appeals Chamber, they recognized that as a matter of principle the power to set time limits is ‘a powerful tool for preventing excessive and unnecessary time being taken by the prosecution’ and ‘to ensure that the prosecution litigates only those issues which are really in dispute and which are necessary to determine for the purposes of its case’. In Milošević, the Trial Chamber proprio motu set a time limit of 14 months for the presentation of the Prosecution case, whilst recognizing ‘the duty of the prosecutor to put forward its case, that it must be given a reasonable opportunity to do so, and that it was not for the Trial Chamber to dictate to the prosecution in any arbitrary way’ how to do it.

In considering the prosecution’s interlocutory appeal, the three-judge bench of

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232 Decision on the Use of Time, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC, ICTY, 9 October 2006 (‘Milutinović et al. use of time decision’), at 3 (‘although the chamber decided not to impose time limits upon the parties at the outset of the trial, relying instead upon the professional judgement of counsel, it has always in mind the possibility that it would be necessary to do so and, in that events, wished to proceed in light of experience gained from the conduct of trial’) and 5 (‘fixing temporal limitations based upon its experience of the trial so far would be conducive to ensuring that the conduct of the case is both fair and expeditious’). See also, in the same case, Transcript, 7 July 2006, at 359-60 (‘the history of the Tribunal probably drives you to the conclusion that some limitation on time will be necessary to reach our goal in a reasonable time. However, … my initial inclination with which I think my colleagues are prepared to go along at my persuasion, is to let it run and see what happens and to trust you, as responsible counsel, to keep this case within bounds. But I recognise it may be necessary, as we move along, to make orders that sort out any kinks that may crop up.’)

233 Milošević time limit appeal decision (n 161), para. 10 (‘every court possesses the inherent power to control the proceedings during the course of trial’); Decision on Adoption of New Measures to Bring the Trial to an End within a Reasonable Time, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 13 November 2006 (‘Prlić et al. time limit trial decision’), para. 14 (‘The Chamber has an inherent power to control the proceedings during the course of the trial and to take appropriate measures.’); Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.4, AC, ICTY, 6 February 2007 (‘Prlić et al. time limit appeal decision’), para. 14.

234 Milatunović et al. use of time decision (n 232), at 2.

235 See ibid., at 3 (‘the Chamber has the power, both before the trial commences and once it is under way, to determine the time available to the parties for the presentation of their respective cases’ – footnotes omitted, emphasis added). See citation of Milošević time limit appeal decision (n 161).

236 Decision on Application by Prosecution for Leave to Appeal, Prosecutor v. Galić, Case No. IT-98-29-AR73, AC, ICTY, 14 December 2001 (‘Galić Rule 73bis appeal decision’), para. 7 (finding, however, that the Trial Chamber’s ‘discretion in fixing that restriction [upon length of the prosecution case] miscarried’ because ‘it was anything but clear what the final issues in dispute were to be at the time when the Trial Chamber imposed the restriction’).

237 Milošević time limit appeal decision (n 161), para. 3.

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the Appeals Chamber had an opportunity to address its objections to the imposition of the time limits. The prosecution argued, in particular, that the imposition of deadline for the presentation of its case ‘inva[d]es the sphere of procedural autonomy’ of the prosecutor in violation of Article 16(2) of the ICTY Statute and its right to a fair and expeditious trial under Article 20 of the Statute, namely its right ‘to present the prosecution case in the manner which it “deems fit (absent a demonstration of abuse)”. In dismissing this argument as ‘misconceived’, the appellate bench interpreted the prosecutorial independence purported under Article 16(2) of the Statute as leaving it entirely to the Prosecutor to investigate the crimes and decide against whom to bring an indictment. It held, however, that upon confirmation of the indictment, ‘the Prosecutor becomes a party before the Tribunal, and thus subject to the power of a Chamber to manage the proceedings, in the same way as any other party before the Tribunal’; and it would be ‘erroneous to suggest that the Prosecutor has an independence in relation to the way in which her case is to be presented before a Trial Chamber which the accused does not have’.

In exercising its powers under Rule 73bis(C)(ii) in the Prlić et al. case, the Trial Chamber had initially indicated that ‘it would be unreasonable for this trial to continue for longer than three years’ and determined that 400 hours would be sufficient for the presentation of the Prosecution case. Subsequently during the course of the trial, the time for the prosecution case was reduced by 107 hours and therewith, the time for the defence cross-examination shortened proportionally. The Prosecution argued that it is also entitled to a fair trial and that it represents not only the victims but also the international community, which entails that it should not be the only Party to bear the weight of the measures intended to expedite the process, but the Trial Chamber did not specifically address those arguments. It recalled instead that all trial activities must be completed by the end of 2008, pursuant to UNSC Resolution 1503 (2003) ‘which governs this trial’, subject to the right of the parties to renewed assessment. Although the Appeals Chamber accorded the trial bench deference owing the significant discretion held by Trial Chambers in issues related to trial management, it examined the decision against the standard employed earlier in Orić, namely whether ‘whether an amount of time allocated is objectively adequate to permit the relevant party to fairly set forth its case’, considering the complexity of the remaining

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238 Ibid., para. 11. Art. 16(2) ICTY Statute (‘The Prosecutor shall add independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.’).

239 Milošević time limit appeal decision (n 233), para. 12.

240 Ibid., para. 13. The appellate bench held correct the prosecution’s acknowledgement that the Trial Chamber’s decision to impose a time limit within which the prosecution was to present its case ‘a discretionary one’ (ibid., para. 14).


242 Prlić et al. time limit trial decision (n 233), paras 3, 15, 20 and 22 (reducing the time available for the presentation of the prosecution evidence from remaining 297 hours to 190 hours). Applying the principle that for the viva voce witnesses, the Defence shall have collectively the same amount of time as the Prosecution has taken for the cross-examination of a witness and shall consult amongst themselves to decide upon the apportionment of this time, see also Milutinović et al. use of time decision (n 232), at 6.

243 However, it dismissed Prlić’s claim that he would renounce his right to an expeditious trial provided that the proceedings were of reasonable duration, by holding that ‘the Accused are not the only ones to have the right to an expeditious trial and, consequently, cannot renounce it’: ibid., paras 12 and 14.

244 Ibid., para. 16.

245 Prlić et al. time limit appeal decision (n 233), para. 24.

246 Ibid., para. 8 (‘The Trial Chamber’s decision … to reduce the time allocated to the Prosecution for the presentation of its evidence was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition … of “the Trial Chamber’s Organic Familiarity with the day-to-day conduct of the parties and practical demands of the case”’) and 20 (‘the imposition of time limits in a trial – whether calculated in months or hours – is entirely the prerogative of the Trial Chamber’).
issues.\footnote{Ibid., para. 14. See also Interlocutory Decision on Length of Defence Case, Prosecutor v. Orić, Case No. IT-03-68-AR73.2, AC, ICTY, 20 July 2005 (‘Orić time limit appeal decision’), para. 8.} Whilst observing that the Trial Chamber’s determination of time limits entails a ‘delicate balancing of interests’ – especially so in the trials of such magnitude and complexity, it found that the Chamber failed to properly examine whether the measure complained of by the Prosecutor would still allow it a fair opportunity to present its case – and thus to provide reasoning in support of its allocation of time.\footnote{Prlić et al. time limit appeal decision (n 233), para. 16.} Although that time could well turn out to be adequate in light of the need to put Prosecution case, the Appeals Chamber invited the trial bench to fill in the gap in its reasoning.\footnote{Ibid., para. 16. See also Decision Following the Appeals Chamber Decision of 6 February 2007 Concerning Appeal Against Reducing Time for the Prosecution Case, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 1 March 2007, at 4 (maintaining its earlier decision upon reassessment thereof in light of the Appeals Chamber’s ruling and noting that the Prosecutor is entitled to move the Chamber for an extension, which will be considered ‘bearing in mind the demands of the Tribunal’s mission’, particularly, the fair trial rights of the accused and the ‘legitimate rights of the victims’).} In addressing the Prosecution’s ‘independence’ argument, the appellate bench maintained, in conformity with its pronouncement in Milošević, that ‘it is erroneous for the Prosecution to suggest that its independence extends to the way in which its case is to be presented before a Trial Chamber’.\footnote{Ibid., paras 22-3 (noting the incorrectness of the interpretation of the trial decision to the effect that ‘because the Completion Strategy is reflected in a Security Council resolution, it is therefore bound to its deadlines in the management of this trial. Rather, it merely considered the Completion Strategy as one factor to be weighed … while correctly stressing that it would not allow the “considerations of autonomy” to “violate the right of the Parties to a fair trial”’.)} The Appeals Chamber did not deem the mention of the completion strategy in the trial decision to amount to an abuse of the discretion by the Trial Chamber, as it turned out that the blunt language to the effect that such strategy ‘governed’ the trial in fact stemmed from a translation mistake.\footnote{Decision on Prosecution Motion for Suspension of the Commencement of Trial and All Related Proceedings, Prosecutor v. R. Delić, Case No. IT-04-83-PT, TC I, ICTY, 5 July 2007, at 2.} The argument was dismissed on the basis of the fact that, before determining the number of witnesses, the Chamber had gone through each

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\item In Delić, the prosecutor requested the Chamber to suspend the commencement of the trial, on the ground that its decision to limit the number of witnesses and time for the presentation of the prosecution case resulted in its being unable to present evidence on one crime site (Maline/Bikoši) and in its case’s being cut to a degree rendering it eligible for transfer pursuant to Rule 11bis, motion to that effect already having been filed.\footnote{Decision Denying the Prosecution Motion for Reconsideration of the Order Limiting the Number of Witnesses It May Call at Trial, Prosecutor v. Stanišić and Župljanin, Case No. IT-08-91-T, TC II, ICTY, 21 October 2009 (‘Stanišić and Župljanin number of witnesses decision’), paras 1 and 20.} The Chamber found this argument without merit and referred to the fact that it had not reduced the scope of the case under Rule 73bis (D) but rather the number of witnesses and hours in view of ‘considerable cumulation’. It furthermore pointed to the liberty of the Prosecution to choose from among the remaining witnesses on its 65ter list those who would testify on the events regarding Maline/Bikoši.\footnote{Ibid., para. 7.}
\item In the Stanišić case, the Trial Chamber declined to reconsider its previous ruling entered at the Pre-Trial Conference pursuant to Rule 73bis(C), setting 212 hours for the presentation of the Prosecution evidence-in-chief and 131 witnesses.\footnote{Ibid., para. 14. See also Decision on Urgent Omnibus Motion for Reconsideration and Postponement of the Commencement of Trial, 9 July 2007, at 4 (rejecting requests to reconsider the decision under Rule 73bis(C) and to allot more time for the presentation of the Prosecution evidence and to postpone the start of the trial).} Among others, the prosecutor claimed that the order attacked is premature and arbitrary, because before sufficient evidence is adduced and cross-examined at trial, it is impossible for the Chamber to credibly assess whether the proposed testimony is unique or corroborative and redundant in relation to other evidence for the purpose of eliminating it.\footnote{Ibid., para. 20.} The argument was dismissed on the basis of the fact that, before determining the number of witnesses, the Chamber had gone through each
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and every witness statement submitted by the prosecution, which adequately equipped the Chamber to reduce the number of witnesses while allowing the fair and thorough presentation of the prosecution case.\textsuperscript{256} The prosecution also objected to the timeliness of the Chamber’s determination of the number of witnesses at this stage, as this measure would ‘significantly diminish the Prosecution’s ability to meet th[e] burden’ of ‘telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond reasonable doubt’.\textsuperscript{257} The Chamber observed, however, that the magnitude of this category of cases ‘necessitates and requires limitations in case presentation by the parties’ so that ‘[n]ot every witness to every incident can be called’, and Rule 73\textit{bis}(C) presents a mechanism via which the Chamber ensures that the prosecution is so limited.\textsuperscript{258}

The ICTY practice regarding the Chamber powers under what currently is Rule 73\textit{bis}(D) and (E) has arguably been even more contentious. One must recall that, while being anything but enthusiastic about the idea of the judges exercising oversight over the scope of the prosecution case in general, the ICTY OTP was particularly against to the 2006 amendment giving the Chamber the Rule 73\textit{bis}(E) prerogative to direct the Prosecutor to select the counts.\textsuperscript{259} It must be noted that, to this author’s knowledge, the judicial power envisaged by this paragraph has not been applied in the ICTY practice, so the core of the prosecution’s objection to it is to be sought in the implications it has for the Rule 73\textit{bis}(D) powers. Even though the initiative by the Chamber under Rule 73\textit{bis}(D) is formulated as an invitation, in fact the judicial request to the Prosecutor to reduce counts amounts, in view of the following paragraph, an ‘offer the prosecution generally cannot refuse’.\textsuperscript{260} Arguably, not in the least degree, this is owing to the mere existence of the Rule 73\textit{bis}(E) power.

The clash of concepts within ICTY can be demonstrated by the controversies surrounding the application of the judicial powers under Rule 73\textit{bis}(D) by the ICTY. Despite that Rule 73\textit{bis}(D) of the ICTY RPE was adopted on 17 July 2003, it took the ICTY about three years to start applying it. For the first time, Rule 73\textit{bis}(D) of the ICTY RPE was applied only in July 2006 in \textit{Milutinović et al.} case. The Trial Chamber deleted three crime sites from among those in relation to which the Prosecution was allowed to present evidence, holding that ‘the case that the Prosecution seeks to establish … will be adequately presented even if evidence in relation to these three sites is not led’.\textsuperscript{261} The dispensation with those crime sites/incidents meant that the Prosecutor would be precluded from leading the relevant evidence. Even though the correspondent charges had formally remained in the indictment throughout the trial, the 73\textit{bis}(D) order effectively resulted in the removal of those charges altogether, as they did in fact not make part of the trial.\textsuperscript{262} The Chamber eliminated them

\textsuperscript{256} \textit{Ibid.}, para. 13.
\textsuperscript{257} \textit{Ibid.}, paras 8-9.
\textsuperscript{258} \textit{Ibid.}, para. 16.
\textsuperscript{259} See Chapter 6, and, in particular, a relevant passage from Thirteenth Annual Report of the ICTY, UN Doc. A/61/271-S/2006/666, 15 August 2006, para. 10. See also M.B. Harmon and F. Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’, (2007) 5(3) JICJ 683, at 697 n56 (characterizing Rule 73 \textit{bis} (E) as ‘troublesome’ and ‘a boon to an accused person because its implementation forces the Prosecution to abandon counts in an indictment thereby eliminating the possibility of establishing the breadth of an accused person’s provable criminality’).
\textsuperscript{260} A. Tieger, ‘Fair and Expedient Trials: The ICTY Experience’, in ‘How to Adjudicate the most serious crimes? Best Practices of Procedure’, Proceedings of the HiiL Colloquium (15-16 October 2007), <http://www.hiiil.org/data/sitemanagement/media/HIIIL_n10189_v1_Publication_Final_Version_Colloquium_2007(1).pdf> (accessed on 1 September 2013). See also Decision on the Amendment of the Indictment and Application of Rule 73 \textit{bis} (D), \textit{Prosecutor v. D. Milošević}, Case No. IT-98-29/1-PT, TC III, ICTY, 12 December 2006 (‘D. Milošević Rule 73\textit{bis}(D) decision’), para. 27 (‘That the Prosecution is required to comply with an order of the Trial Chamber [under Rule 73\textit{bis}] is unquestionable and by this Decision the Trial Chamber orders the Prosecution to reduce the scope of its case’).
\textsuperscript{261} Decision on Application of Rule 73\textit{bis}, \textit{Prosecutor v. Milutinović et al.}, Case No. IT-05-87-T, TC I, ICTY, 11 July 2006 (‘Milutinović \textit{et al.} Rule 73 \textit{bis} decision’), paras 6, 10, and 13, disallowing the prosecution to lead crime-base evidence as to three killing sites (Račak/Rečak, Padaliste/Padalishë and Dubrava/Dubravë prison).
\textsuperscript{262} Order Regarding Prosecution’s Submission with Respect to Rule 73 \textit{bis} (D), \textit{Prosecutor v. Milutinović et al.}, Case No. IT-05-87-T, TC I, ICTY, 7 April 2009, paras 2 and 4.
formally after the judgement, on the basis that the Prosecution neither moved the Chamber to vary its 73bis(D) decision nor indicated its intention to proceed further against any of the Accused in its submissions.\footnote{Milutinović et al. Rule 73bis decision (n 261), para. 8. The submissions of the parties as to the fate of the outstanding charges was solicited by the Trial Chamber in: Judgement (vol. 3), Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC I, ICTY, 26 February 2009, para. 1213.}

As it was the first application of that sub-Rule, the Chamber took the opportunity to take stock of the options available to it. Notably, it examined Rule 73bis (D) and (E) powers jointly, thus identifying the four measures: (a) inviting the Prosecution to reduce the number of counts; (b) fixing the number of crime sites; (c) fixing the number of incidents; and (d) directing the prosecution to select the counts upon which to proceed.\footnote{Ibid.} In relation to all four measures, the Chamber is bound by the principles of a fair and expeditious trial.\footnote{Ibid.}

The Chamber addressed the submission of the Prosecutor that the Chamber was only authorized to set the number of such crime sites and incidents that are ‘reasonably representative of the nature of theme of the case’ and let the Prosecutor select them.\footnote{Ibid., para. 8 (the prosecution stated at the Pre-Trial Conference the Chamber’s fixing of the particular crime sites would ‘allow … the judiciary to intrude in the area of what should be the Prosecution’s bailiwick’ as it the latter ‘should be in the best position to determine what’s representative of their case’).}

However, the Chamber confirmed its competence to determine what crime sites or incidents satisfy the standard of ‘reasonable representativeness’, rejecting the other approach as cumbersome and the one ‘that runs the risk of imposing an arbitrary and ill-fitting numerical constraint on a case’.\footnote{Ibid., paras 9-10 (stating that ‘it is possible for the Chamber to determine the charges on which evidence should be led at trial by identifying those crime sites or incidents that are clearly different from the fundamental nature or theme of the case, and ordering the Prosecution to lead evidence relating to the other sites or incidents that fall squarely within that nature or theme.’).}

The prosecution sought leave to appeal the decision, asserting its exclusive province to determine which crimes sites to proceed on and which evidence to present and alleging that the ‘usurpation’ of that power by the Chamber effectively denied it a fair trial. But the Trial Chamber denied its request as failing to meet the test for certification of interlocutory appeal under Rule 73.\footnote{Decision Denying Prosecution’s Request for Certification of Rule 73 bis Issue for Appeal, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC III, ICTY, 30 August 2006, paras 10-13.}

The burning argument of the Prosecutor that the impugned practice raises an important distribution-of-powers issue was dismissed as irrelevant.\footnote{Ibid., para. 9.}

It appears true that the ‘prudent use’ by the Chamber of Rule 73bis(D) powers, including the removal of certain crimes sites and incidents, enabled it to conclude this six-accused trial in the relatively short time line of 25 months.\footnote{G. Higgins, ‘The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY’, (2009) 7(2) Northwestern Journal of International Human Rights 239, at 248-9.}

One commentator expressed skepticism about the viability of the ICTY Rule 73bis(D); he opined that the said decision was and would remain uncharacteristic for the ICTY practice due to the Presiding Judge’s familiarity with the ‘nature and theme’ of the charges, due to his involvement in the Milošević case dealing with similar facts (ethnic cleansing campaign in Kosovo in March and April 1999).\footnote{O-G. Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, (2007) 5(2) JICJ 360, at 374-5.}

However, the subsequent ICTY practice has demonstrated that the trial Judges were prepared to proactively exercise their Rule 73bis powers, including the fixing of the crime sites or incidents under Rule 73bis(D) as well as determining the time available for the presentation of the prosecution case.

Thus, in Šešelj, the prosecutor initially ‘declined’ the Chamber’s invitation to reduce the scope of the indictment by at least one-third as calling for a measure that was ‘unnecessary’...
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and ‘imped[ing] the Prosecution’s ability to prove its case’.\(^{272}\) In response to the Chamber’s repeated invitation, the prosecution proposed to drop five cumulative counts, as their removal could help reduce the scope of litigation, and to remove a number of crime sites in Croatia and BiH, provided that the Chamber allows to lead some of the relevant evidence as ‘non-crime-base’ evidence.\(^{273}\) Besides approving the Prosecution’s proposals, the Chamber reduced the indictment by excluding at least two additional crime sites.\(^ {274}\)

The measures under Rule 73\(^{\text{bis}}\)(D) were taken in several other cases.\(^ {275}\) Those cases typically fit in the usual pattern of initial resistance by the Prosecution, with reference to its independence, and inevitable surrender to the judicial order not to lead evidence with respect to some crime sites or incidents, unless adduced to prove context or JCE.\(^ {276}\) Most recently, after a characteristic exchange, the Karadžić Trial Chamber expressed both a grave concern about ‘the scope of the Prosecution’s case and the potential effect that this will have on the fair and expeditious conduct of the trial and the administration of justice’ and disappointment with its ‘reluctance to identify further crimes sites and incidents that might be omitted’ from the trial.\(^ {277}\) The Chamber fixed the crimes sites or incidents following the prosecutor’s proposal to remove a number of municipalities and individual crime sites as well as determining the time for the presentation of the prosecution case as a total of 300 hours.\(^ {278}\)

Quite exceptionally, in Haradinaj et al., the Chamber was satisfied with the prosecution explanation for retaining eight counts, namely that it was faced with the challenge of proving broad allegations of the existence of a JCE and widespread and systematic attack, while

\(^{272}\) Decision on the Application of Rule 73 \(\text{bis}\), Prosecutor v. Šešelj, Case No. IT-03-67-PT, TC I, ICTY, 8 November 2006, para. 5.

\(^{273}\) Ibid., paras 13-9. The prosecution proposal concerned dropping charges relating to Western Slavonia (Croatia) and to the municipalities of Brčko and Bijeljina (BiH) as a measure which would allow removing from the witness list all crime base witnesses (at paras 15-6). Under ‘non-crime-base evidence’, one is to understand, among others, ‘pattern evidence and evidence that goes to proof of the purpose and methods of the joint criminal enterprise charged in the Indictment, proof of the degree of co-ordination and co-operation of individuals and institutions that are allegedly part of the joint criminal enterprise’ (para. 17).

\(^{274}\) Ibid., paras 19 and 22 (Bosanski Šamac and Brčko Jezero).

\(^{275}\) D. Milošević Rule 73\(^{\text{bis}}\) decision (n 260), paras 38-9 (accepting the prosecution proposal to remove 16 incidents from the indictment and 54 witnesses from the list, resulting in an estimated 93-hour reduction of the time for \(\text{viva voce}\) evidence); Order Pursuant to Rule 73\(^{\text{bis}}\)(D) to Reduce the Indictment, Prosecutor v. Gotovina et al., Case No. IT-06-90-PT, TC I, ICTY, 21 February 2007 (‘Gotovina Rule 73\(^{\text{bis}}\) decision’), at 2-3 (accepting the Prosecution’s proposal to shorten its case by not proceeding on a number of crimes sites in six municipalities and by excluding all allegations relating to October and November 1995, whilst being permitted to present non-crime-base evidence on ‘pattern, intent, or knowledge’); Decision pursuant to Rule 73\(^{\text{bis}}\)(D), Prosecutor v. Stanislić and Simatović, Case No. IT-03-69-PT, TC III, ICTY, 4 February 2008 (‘Stanislić and Simatović Rule 73\(^{\text{bis}}\) decision’), paras 4-5 and 23-9 (the prosecution proposing, and the Chamber accepting, the reduction of the scope of the indictment by way of dropping a number of incidents, provided that the Prosecution would still be allowed to present evidence that goes to the proof of the JCE); Perišić Rule 73\(^{\text{bis}}\) decision (n 227), paras 16-7 and ‘Disposition’ (ordering the Prosecution to lead evidence neither on terror (‘protracted sniping and shelling campaign’) in Sarajevo (proposed 22 witnesses) nor regarding the ‘unscheduled incidents’ in Sarajevo counts as indicated on 65 \(\text{ter}\) witness summaries, unless extended leave to do so upon showing that leading such evidence would be ‘essential to prove an important aspect of the case’).

\(^{276}\) ICTY Manual on Developed Practices (n 6), at 67.

\(^{277}\) Decision on Application of Rule 73 \(\text{bis}\), Prosecutor v. Karadžić, Case No. IT-98-5/18-PT, TC, ICTY, 9 October 2009, para. 5. The Chamber also reiterated that ‘the preclusion of evidence pertaining to certain crimes sites or incidents is not meant to suggest that the associated charges are of lesser importance than others. On the contrary, keeping the trial manageable is simply necessary to ensure that justice is done in a fair and expeditious manner, which is in the interests of all parties.’ Cf. Stanislić and Simatović Rule 73\(^{\text{bis}}\) decision (n 275), para. 29 (‘this Decision should in no way be interpreted as a determination that the events described in the paragraphs of the Indictment to be dropped are of less significance than those that have been retained.’)

\(^{278}\) Ibid., paras 2, 6, and 11 (removing eight municipalities in their entirety and a number of individual incidents or crime sites connected to the remaining municipalities, Srebrenica enclave, and Sarajevo siege) and 7 (determining a figure of 300 hours, which encompasses ‘examination-in-chief and any re-examination of its \(\text{viva voce}\) and Rule 92 \(\text{ter}\) witnesses, including any witnesses whose evidence is denied admission under Rule 92 \(\text{bis}\) ... time for any witnesses who have been placed on the Prosecution’s reserve witness list and who the Prosecution determines during the course of its case-in-chief that it needs to call.’)

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disposing of relatively few witnesses and incidents.\textsuperscript{279} It held that erasing the counts may ‘result in an indictment that is no longer reasonably representative of the case as a whole and … affect the prosecutor’s ability to present evidence on the scope of the alleged widespread or systematic attack and joint criminal enterprise.’\textsuperscript{280} In the remarkable Perišić decision, the Chamber rejected the prosecutor’s proposal to dispose of four counts in the amended indictment regarding the shelling of Zagreb, because ‘the elimination of evidence on an entire crime site (Zagreb) in a country (Croatia) not otherwise represented … does not fulfil the requirement of Rule 73\textsuperscript{bis}(D)’ and ‘a consequence of removing the Zagreb counts would be that the victims of the alleged crimes committed in Zagreb are no longer represented in this case.’\textsuperscript{281} Thus, as a part of the ‘reasonable representativeness’ assessment, the Perišić Chamber played the role traditionally ascribed, in the context of the charging activity and Rule 73\textsuperscript{bis} litigation, to the prosecutor: namely, that of striving to deliver justice evenly to all victims represented in the original counts.

As this overview demonstrates, in invoking their Rule 73\textsuperscript{bis} powers the ICTY Trial Chambers have normally ‘macro-managed’ rather than micro-managed the case; the predominant approach was to impose general limits in terms of time for the presentation of prosecution case and number of witnesses to be called, whilst according the parties with fairly significant autonomy to develop the case within the set limits as they saw fit.\textsuperscript{282} For instance, it has been typical to request the prosecution to propose means of shortening its case by ‘at least one-third’, by way of reducing the number of counts and underlying crime sites or incidents.\textsuperscript{283} This is understandable: in this early procedural stage, it is practically difficult for the judges to be acquainted with the prosecution case enough to be able to curtail it in any other way.\textsuperscript{284} Furthermore, the measures going beyond the ‘macro-management’ approach would overreach what Rule 73\textsuperscript{bis} is meant to authorize and, arguably, would inappropriately encroach upon the minimum necessary procedural autonomy of the prosecution, who, as a party with a burden of proof, is expected to present its best and most effective evidence. The broader and more interventionist the powers of the judges in relation to the prosecution (and equally for that purpose, the defence) case, the more damage can be done to the respective

\textsuperscript{279} Decision Pursuant to Rule 73 \textsuperscript{bis} (D), \textit{Prosecutor v. Haradinaj et al.}, Case No. IT-04-84-PT, TC, ICTY, 22 February 2007, paras 7-8 and 13 (accepting the Prosecutor’s reasoning is response to the Chamber’s request and the declination to reduce the scope of the indictment).

\textsuperscript{280} \textit{Ibid.}, paras 9 and 11 (‘Considering the relatively small number of witnesses in the case, the potential unavailability of even a few witnesses may have a detrimental affect [sic] on the ability of the Prosecutor to present its case. Furthermore, the elimination of a few incidents as proposed by the Chamber may be detrimental to the Prosecutor’s ability to lead evidence in relation to the scope of the alleged widespread or systematic attack. … [T]he removal of incidents may upset the balance of the ethnicity of victims and may diminish the alleged scope of the joint criminal enterprise.’). Cf. \textit{Stanišić and Simatović} Rule 73\textsuperscript{bis}(D) decision (n 279), paras 11 (responding to the prosecutor’s submission that ‘the case is not reducible’ by stating ‘it will only be in very exceptional circumstances that a case cannot be reduced within the terms of Rule 73 \textsuperscript{bis} (D).’) and 15 (declaring to follow the approach taken in \textit{Haradinaj et al.}).

\textsuperscript{281} \textit{Perišić} Rule 73\textsuperscript{bis} decision (n 227), paras 5 and 12.

\textsuperscript{282} Tieger, ‘Fair and Expeditious Trials’ (n 260). E.g. Decision on Prosecution’s Motion Pursuant to Rule 73 \textsuperscript{bis} (F), \textit{Prosecutor v. D. Milošević}, Case No. IT-98-29/1-T, TC III, ICTY, 3 April 2007 (‘D. Milošević Rule 73\textsuperscript{bis}(F) decision’), para. 16.

\textsuperscript{283} E.g. \textit{Šešelj} Rule 73\textsuperscript{bis}(D) decision (n 275), para. 3; \textit{D. Milošević} Rule 73\textsuperscript{bis}(D) decision (n 260), para. 17; \textit{Gotovina} Rule 73\textsuperscript{bis}(D) order, \textit{ibid.}, at 2; \textit{Stanišić and Simatović} Rule 73\textsuperscript{bis}(D) decision, \textit{ibid.}, para. 2; \textit{Perišić} Rule 73\textsuperscript{bis}(D) decision (n 227), para. 12.

\textsuperscript{284} Tieger, ‘Fair and Expeditious Trials’ (n 260) (‘if the prosecutors do not know their cases sufficiently, what is the likelihood that judges will? Prosecutors and their teams may have been working on cases for years, while the judges – particularly at the early stages of the proceedings – will only have bits and pieces of information. The limited exposure to the case at this early stage makes it exceedingly difficult for judges, sometimes with no courtroom experience, to make decisions that will affect the course or scope of the trial.’); Higgins, ‘The Impact of the Size, Scope, and Scale of the Milošević Trial’ (n 270), at 258 (doubting that the \textit{Milošević} Chamber would be able to gain sufficient familiarity with the prosecution’s case, with its sixty-six counts, to allow it to effectively use the—non-existent at the time—powers to invite the Prosecution to select counts and to fix the crime sites).
party’s trial strategy by the imbalanced use of those powers. Consequently, more care needs to be taken by the bench in exercising them and the more solid knowledge is required of the contours of the prosecution case. Eventually, the Trial Chamber’s willingness and ability to give full and meaningful effect to its prerogatives under Rule 73bis is dependent upon whether sufficient amount of work and time is invested into attaining true familiarity with that case.\(^ {285}\)

Admittedly, it is highly important that the managerial powers of limiting the prospective prosecution case are exercised by the Chamber with utmost care and on an informed basis, subject to review by the Appeals Chamber.\(^ {286}\) This concerns \textit{a fortiori} the far-reaching and ‘extraordinary’ competence such as that provided under Rule 73bis(E) of the ICTY.\(^ {287}\) To that end, Rule 65ter specifically envisages various forms of communication between the Trial Chamber and pre-trial judge, aimed at keeping the Chamber informed on the progress of pre-trial preparations. This includes the pre-trial judge duty’s to order the parties to file written submissions with the Trial Chamber and to report regularly to the Chamber where issues are in dispute and referring to it such disputes,\(^ {288}\) as well as the important obligation to submit to the Trial Chamber a complete file consisting of all filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of PTJ’s functions.\(^ {289}\) Naturally, such communication is facilitated considerably if the PTJ is the member of the Trial Chamber to be sitting in trial of the case, which is also likely to increase the awareness of the prosecution case by the Trial Chamber prior to the Pre-Trial Conference.\(^ {290}\) Accordingly, in relation to each type of decision to narrow down the Prosecution case to be exercised by the Chamber at a Pre-Trial Conference, Rule 73bis of the ICTY RPE hints at the Chamber’s obligation to consult with the PTJ’s submissions,\(^ {291}\) or necessarily hear the Prosecutor or both parties.\(^ {292}\)

Importantly, the ICTY, ICTR, and SCSL Rules provide for a ‘safety buffer’, which is, as one ICTY Judge put it, the ‘saving grace’ in case the Chamber’s preceding decisions to cut down the number of witnesses or limit the estimated length of their examination-in-chief prove to be in need of adjustment in the course of the trial.\(^ {293}\) The link between the managerial judicial powers and the power to vary is not mandatory, and it is possible to interpret Rule 73bis as allowing the prosecutor to request the variation even where the Chamber has not taken measures to reduce the prosecution case.\(^ {294}\) But under a more usual scenario, the

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  \item \(^ {285}\) Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 144), at 354 (‘It takes a great deal of work for the bench to be sufficiently familiar with the case to be able to make these decision wisely.’); Kwon, ‘The Challenge of an International Criminal Trial’ (n 271), at 375 (‘The proper use of the Rule requires a comprehensive and intimate understanding of the prosecution’s case.’)
  \item \(^ {286}\) Galić Rule 73bis appeal decision (n 236), para. 7 (‘Rule 73bis… requires the Trial Chamber to consider with care whether the issues really in dispute have been clearly identified so that a proper assessment of the time needed for the prosecution can be made.’)
  \item \(^ {287}\) Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 388 and 391-2.
  \item \(^ {288}\) Rule 65ter(H) and (J) ICTY RPE.
  \item \(^ {289}\) Rule 65ter(L)(i) ICTY RPE.
  \item \(^ {290}\) Kwon, ‘The Challenge of an International Criminal Trial’ (n 271), at 375 (‘Unless one of the judges in the Trial Chamber also served as pre-trial judge in a given case, most Trial Chambers are unlikely to have this understanding by the time of the pre-trial conference, when the rule’s possible invocation is anticipated, because the judges will have only recently been assigned to the case.’)
  \item \(^ {291}\) See ICTY Rule 73bis(B), (C) (‘In the light of the file submitted to the Trial Chamber by the pre-trial Judge…’) and (E) (‘Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph L(i) of Rule 65 ter…’).
  \item \(^ {292}\) See Rule 73bis(D) and (E) ICTY RPE.
  \item \(^ {293}\) Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 144), at 355 (‘The saving grace is that the rule provides for these decisions to be revisited, depending on the progress made in the trial.’)
  \item \(^ {294}\) See Decision Regarding the Prosecution’s Further Renewed Witness List, \textit{Prosecutor v. Sesay et al.}, Case No. SCSL-04-15-T, TC I, SCSL, 5 April 2005 (‘Sesay et al. witness list decision’), para. 16 (‘this Chamber disagrees with the Prosecution assertion that this Rule [73bis(E)] only applies subsequent to an order of the Trial Chamber or Judge to reduce the number of Prosecution witnesses pursuant to Rule 73bis(D)’).
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powers to vary the previous decisions determining the scope of the Prosecution case mirror the competences on the basis of which those decisions were taken. In particular, the present Rule 73bis(F) of the ICTY RPE authorizes the prosecutor, after the commencement of the trial, to move the Chamber to vary the decisions fixing the number of crime sites or incidents with respect to which the evidence may be presented and limiting the number of witnesses to be called, or to request additional time to present evidence. The possibility of varying the Chamber’s rulings entered at the Pre-Trial Conference depending on how the case develops provides an additional guarantee of the Prosecution’s right to put the case fairly and effectively.\(^{295}\) As an ICTY Trial Chamber has observed, the interplay between Rule 73bis(C) and (F) creates the necessary balance between the prosecution’s right to prove beyond reasonable doubt its case against the accused and the Chamber’s duty to ensure a fair and expeditious trial.\(^{296}\) The effect of a Rule 73bis (F) decision is correcting the original determination because of circumstances which have arise since, rather than to cure any prejudice created by error in that determination.\(^{297}\)

The standard to be met for the Chamber to grant the request to vary or for additional time is ‘the interests of justice’\(^{298}\). The initial version of the ICTY Rule accorded the prosecutor with the prerogative to apply, after the commencement of trial, if he considers that in the interests of justice, for reinstatement of the list of witnesses or vary decision as to which witnesses are to be called, but in 2001 the Rule was reformulated to specially reserve the determination of the ‘interests of justice’ to the Chamber.\(^{299}\) The ICTR and SCSL Rule 73bis(E) are equally worded and contain language identical to that of the original ICTY Rule. As follows from the ICTY and ICTR jurisprudence, the said standard is indicative of wide discretion the Trial Chambers possess when deciding whether prosecution witnesses lists may be reinstated or varied.\(^{300}\) In the ICTY framework, as opposed to that of the ICTR and SCSL, the Trial Chamber may also refuse to hear a witness whose name does not appear on the list.\(^{301}\) Given the regularity with which the Prosecution has made requests to amend the relevant lists, the ICTY, ICTR and SCSL have developed exuberant case law dealing with the matter. As could have expected, its cornerstone lies in the interpretation of the test.

Prior to the adoption of Rule 73bis, in the Čelibići case, the ICTY authorized the prosecution to call seven additional witnesses under Rule 54. The Trial Chamber held that it is ‘enjoined to utilise all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties’ and that ‘[i]t is thus important to adopt a flexible approach when considering the management of witnesses’, as far as it does not affect the rights of the accused.\(^{302}\) For the first time, the Trial Chamber had an opportunity to comment on the tension between the opposing interests that is apparent in the prosecutor’s request to allow calling additional witnesses made after the commencement of trial. It

\(^{295}\) E.g. Milutinović et al. Rule 73bis decision (n 261), para. 12.

\(^{296}\) Stanišić and Zapljanin number of witnesses decision (n 254), para. 17.

\(^{297}\) Galić Rule 73bis appeal decision (n 236), para. 12.

\(^{298}\) Rule 73bis(E) ICTY RPE (IT/32/Rev. 13, 10 July 1998). After an insignificant linguistic amendment of 17 November 1999 (IT/32/Rev. 17) that in addition re-indexed the sub-rule as paragraph (D), paragraph (F) was adopted, allowing the Chamber to grant the prosecutor’s request for additional time during trial to present evidence ‘in the interests of justice’ (Rule 73bis(F) ICTY RPE (IT/32/Rev. 20, 12 April 2001). The Rule took its present form with an amendment of 17 April 2003 (IT/32/Rev. 28, 17 July 2003).

\(^{299}\) Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65ter Witness List, Prosecutor v. Milutinović et al., Case No. IT-05-87-AR73.1, AC, ICTY, 20 April 2007, para. 8; Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, Prosecutor v. Nahimana et al., Case ICTR-99-52-I, TC I, ICTR, 26 June 2001 (‘Nahimana et al. prosecution witness list decision’), para. 17 (‘The final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Chamber’); Karemera et al. variance decision (n 230), para. 12.

\(^{300}\) Supra n 223.

\(^{301}\) Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC, ICTY, 4 September 1997, para. 7.
stressed, on the one hand, that ‘[i]t is axiomatic that the jurisdictional prerequisites for the crimes … are to be satisfied by the Prosecution in the presentation of its case’, who is expected ‘to lead sufficient evidence in order to discharge its burden’.302 On the other hand, however, there is a presumption that the witness list disclosed prior to trial is final and no additional witnesses may be called unless there are exceptional circumstances, because ‘the Prosecution ought not to surprise the Defence with additional witnesses whose testimony was foreseeably required prior to the commencement of trial and who were accessible to the Prosecution’.303

Subsequently in Jelisić, the Chamber held ‘it to be in the interest of justice that any evidence necessary to ascertain the truth be presented to it and subject to examination by the parties’, whilst ‘such interests must not prejudice the principle that the accused has the right to be tried without undue delay’.304 Similarly, the Galić Chamber emphasized that the exercise of its discretion under ‘the interests of justice’ formula rests on balancing the truth-finding goal against the provision of the defence with sufficient notice.305 In the determinations of the prosecution motions to vary witness lists, the ICTY Trial Chambers have consistently considered the admissibility requirements such as relevance and probative value of the proposed evidence, the latter on the balance with the need to ensure a fair trial under Rule 89(D), and the adequate protection of the interests of the defence, in particular the possibility of prejudice in result of late addition of witnesses and late disclosure disabling the effective preparation for cross-examination.306 Among factors relevant for the assessment of a possible prejudice are: the showing by the party of a ‘good cause’ for or ‘sufficient justification’ of its request, the stage of the proceedings at which the request is made; whether the variation sought would result in a delay; and whether the moving party has exercised due diligence in identifying a proposed witness at the earliest possible moment.307 Within this framework, the ICTY Chambers accorded the Prosecution with a necessary leeway in relation to their witness...
lists and, in particular as far as removal of witnesses from that list is concerned, as a corollary of the liberty of the parties to put their case as they see fit. 308 Finally, even though Rule 73bis(F) of the ICTY RPE specifies no procedure for amendment of exhibits lists, the ICTY Trial Chambers have applied identical standards and conditioned the leave to vary such list upon the observance of the right of the accused to a fair trial and, particularly, the right to be informed promptly and in detail of the charges. 309

When deciding on requests under Rule 73bis(E), the Trial Chambers of the ICTR have also consistently used the test of ‘interests of justice’, 310 which was understood as ‘a discretionary standard applicable in determining a matter given the particularity of the case’. 311 The standard of a ‘good cause’—originally the test of Rule 66(A)(ii) for allowing the prosecutor’s pre-trial disclosure of the statements of additional witness—was deemed to be fully applicable for the purpose of requesting variation of prosecution witness list at trial. 312 But in slight variance from the ICTY approach, it appears to have been applied instead of or alongside with that of ‘interests of justice’, rather than being subsumed by the same. 313

The non-exhaustive list of the factors relevant to ascertaining the standards of the ‘interests of justice’ and ‘good cause’ included: the timelines of the disclosure to the defence, its ability to prepare for effective cross-examination and any prejudice; the materiality of the proposed witness’ testimony and its probative value in relation to the existing witnesses; the reasons and justification offered by the prosecution for the inclusion of the witness; the date on which the proposed witness would be called and the stage of the proceedings; and the

308 Halilović variation decision (n 307), at 6 (noting that ‘in principle it is for each Party to decide which witnesses to call to prove its case’ and ‘the Defence is at liberty, if it deems it beneficial to the presentation of its case, to call the witnesses the Prosecution seeks to withdraw from its witness list during the Defence case’).
309 E.g. Decision on Prosecution’s Third Motion for Leave to Amend Its Rule 65 ter Exhibit List, Prosecutor v. D. Milošević, Case No. IT-98-29/1-PT, TC III, ICTY, 23 April 2007, at 3 and, in the same case, Decision on Prosecution’s Second Motion for Leave to Amend Its Rule 65ter Exhibit List, 14 February 2007, at 3 and Decision on the Prosecution on Motion to Amend its Rule 65 ter Exhibit List, 21 December 2006, at 2 and 3; Decision on Prosecution’s Motion for Leave to Amend Rule 65 ter Witness List and Rule 65 ter Exhibit List, Prosecutor v. Popović et al., Case No. IT-05-88-T, TC II, ICTY, 6 December 2006, at 6-7 and, in the same case, Decision on Prosecution’s Third Motion for Leave to Amend Rule 65 ter Exhibit List, 10 January 2007, at 2; Decision on Prosecution’s Application for Leave to Vary Its Exhibit List Filed Pursuant to Rule 65 ter (E) (iii), Halilović (n 307), at 3; Trial Chamber’s Clarification on Whether the Prosecution Must Request Leave to Amend its Rule 65ter Exhibit List, Prosecutor v. Haradinaj et al., Case IT-04-84-T, TC I, ICTY, 25 May 2007, para. 4; Decision on Prosecution’s Motion to Amend its Rule 65 ter Exhibit List, Prosecutor v. Martić, Case No. IT-95-11-PT, TC I, ICTY, 15 December 2005, at 3.
310 Decision on the Prosecutor’s Request for Leave to Call Six New Witnesses (TC), Prosecutor v. Musema, Case No. ICTR-96-13-T, TC, ICTR, 20 April 1999 (‘Musema prosecution new witnesses decision’), para. 10; Decision on Prosecution Motion for Addition of Witness Pursuant to Rule 73 bis (E), Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 26 June 2003 (‘Bagosora et al. 73bis(E) decision’), para. 13; Karemera et al. variance decision (n 230), para. 4 and, in the same case, Decision on Prosecutor’s Motion to Vary its Witness List (TC), 2 October 2006, para. 3; Decision on the Prosecution’s Motion dated 9 August 2005 to Vary its List of Witnesses Pursuant to Rule 73bis (E), Prosecutor v. A. Bizimungu et al., Case No. ICTR-2000-56-T, TC II, ICTR, 21 September 2005, para. 32; Decision on Prosecution Motion to Vary Its List of Witnesses, Prosecutor v. Nidindiliyimana et al., Case No. ICTR-2000-56-T, TC II, ICTR, 11 February 2005 (‘Nidindiliyimana et al. prosecution variation decision’), paras 20 and 22; Decision on the Prosecutor’s Motions for Variation of Witness List and Protective Measures for Witnesses BUW, CCF,CCJ and BLJ, Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, TC II, ICTR, 14 February 2007 (‘Rukundo variation decision’), para. 9; Decision on Motion for Protective Measures, Variation of the Witness List,.., Prosecutor v. Bikindi, Case No. ICTR-2001-72-T, TC III, ICTR, 5 February 2007, para. 7.
311 Nahimana et al. prosecution witness list decision (n 299), para. 19. See also Decision on Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73 bis(E), Prosecutor v. Brima et al., Case No. SCSL-04-16-T, TC II, SCSL, 5 August 2005 (‘Brima et al. Rule 73bis(E) decision’), para. 25.
312 Ibid., para. 18.
complexity of the case.\textsuperscript{314} Notably, credibility of the proposed witness is not a part of that assessment.\textsuperscript{315} In applying Rule 73bis(E), the SCSL has adhered to the ICTR practice in all major respects, in particular, the standards of ‘interests of justice’ and ‘good cause’,\textsuperscript{316} as well as the individual factors relevant to that assessment.\textsuperscript{317}

As recognized on many occasions by both the ICTR and the SCSL, the general approach in applying these criteria requires a ‘close analysis’ of each witness and flexibility in the exercise of the Chamber’s discretion.\textsuperscript{318} Admittedly, the core of the determination under Rule 73bis(E) is in striking the balance between the prosecutor’s duty ‘to present the best available evidence to prove its case’ and the rights to have adequate time and facilities to prepare defence and to be tried without undue delay.\textsuperscript{319} The fundamental principle for granting such requests is that the prosecution may not be allowed to engage in the ‘trial by ambush’ tactics and must comply in good faith with its disclosure obligations, in spirit with the equality of arms.\textsuperscript{320}

D. Pre-Defence Conference

a. Rationale

Rule 73ter of the ICTY, ICTR, and SCSL uniformly authorizes Trial Chambers to hold a Pre-Defence Conference after the prosecution’s case is rested and prior to the commencement of its case.\textsuperscript{321} Unlike with Pre-Trial Conferences, the Chambers may—rather than shall—hold such a conference. This choice of words may be explained by the uncertainty as

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\textsuperscript{314} Nahimana \textit{et al.}, prosecution witness list decision (n 299), para. 20; Bagosora \textit{et al.}, Rule 73bis(E) decision (n 310), para. 14 and, in the same case, Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73bis(E), 21 May 2004, para. 13; \textit{Rukundo} variation decision (n 310), para. 9; Musema prosecution new witnesses decision (n 310), paras 4 and 13; Decision on Prosecutor’s Very Urgent Motion Pursuant to Rule 73bis (E) to Vary the Prosecutor’s List of Witnesses Filed on 25 May 2004 (TC), \textit{Prosecutor v. C. Bizimungu et al.}, Case No. ICTR-99-50-T, TC II, ICTR, 3 September 2004 (‘\textit{C. Bizimungu et al. 73bis(E) decision}’), para. 16; Karemera \textit{et al.}, variance decision (n 230), para. 11.

\textsuperscript{315} C. Bizimungu \textit{et al. 73bis(E) decision} (n 314), para. 22.


\textsuperscript{317} Norman \textit{et al. additional witnesses decision, ibid.,} para. 17; Brima \textit{et al. witness Bangura decision} (n 166), paras 21-2; Sesay \textit{et al. additional witnesses decision} (n 316), paras 29-30.


\textsuperscript{319} Nahimana \textit{et al.} prosecution witness list decision (n 299), para. 20; Decision on the Prosecutor’s Motion to Vary His Witness List, \textit{Prosecutor v. Zigiranyirazo}, Case No. ICTR-2001-73-T, TC III, ICTR, 19 January 2006 (including in the ‘interests of justice’ allowing the parties to present their cases and to bring the best evidence available); Norman \textit{et al.} witness Haglund decision (n 316), para. 15 (‘the Chamber must draw a balance between the Statutory right of the accused persons … to a fair and expeditious trial and the equally important and very challenging right of the Prosecution for [sic] access to evidence and all material that would contribute not only to discharging the onerous legal burden that it bears …, but also to furnish the Court with evidence that would contribute to fulfilling its mission of ensuring that justice is done to all parties.’).

\textsuperscript{320} Ndindiliyimana \textit{et al.} prosecution variation decision (n 310), para. 27; Norman \textit{et al.} witness Haglund decision (n 316), para. 15; Norman \textit{et al.} additional witnesses decision (n 316), paras 18-9 and, in the same case, Decision on Prosecution Request for Leave to Call Additional Witnesses and for Orders for Protective Measures, 21 June 2005, at 3; Sesay \textit{et al.} additional witnesses decision (n 316), para. 31; Sesay \textit{et al.} II additional witnesses decision (n 318), para. 27; Sesay \textit{et al.} witness list decision (n 294), para. 19.

\textsuperscript{321} Rule 73ter(T) ICTY, ICTR, and SCSL RPE.

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to whether there is indeed going to be a defence phase of trial, let alone the need to prepare for it, given the possibility of acquittal on all charges pursuant to the ICTY/ICTR Rule 98bis or the SCSL Rule 98. Hence, the formulation of the Chamber’s competence as an authorization rather than obligation eventually serves to honour the presumption of innocence rather than indicates the optional character or reduced importance of these meetings. In practice, Pre-Defence Conferences are a regular and indispensable element of the proceedings whenever the Defence chooses to respond to the charges and present its case. Bearing similarity to Pre-Trial Conferences, this type of conferences is a one-time event, even in cases involving multiple accused.

The rationale for holding a Pre-Defence Conference is analogous to that of the Pre-Trial Conferences, but in relation to the defence interval of the case. Namely, it is conducted to ensure the practicable size of that part of the case with a view to streamlined and fair hearing of defence evidence. These goals are to be attained by focusing the Defence case on the issues that are truly relevant and disputed, confining the defence’s evidence to what is necessary to prove its case, as well as by enabling the Prosecution to prepare for cross-examination. Normally and in most cases, the length of the defence case is dictated by the length of the one for the Prosecution, and hence it is the latter case that must be the primary target for the reduction under Rule 73bis. Nevertheless, the defence may not be allowed an opportunity of presenting its case indefinitely, without any reasonable temporal limits and restrictions as to the number of witnesses to be called, lest its case-in-chief take exceedingly long time and subvert the notion of a fair and expeditious trial.

As with the Pre-Trial Conferences, the goals of the Pre-Defence Conference, the scope and timing of the submissions by the parties, and the judicial functions to be exercised during or in the wake of that conference, vary slightly between the ICTY, ICTR and SCSL due to the divergent amendments of the Rules. As a result of the November 1999 amendment of the ICTY Rules which transferred the function of collecting the parties’ submissions to the PTJ, the ICTY Pre-Defence Conference is now a forum for the trial judges to exercise their managerial duties upon the defence case, such as reviewing the defence witness list and setting the number of witnesses; determining the time for the defence case-in-chief as well as dealing with other appropriate matters to facilitate the presentation of that case. This is facilitated by the practical circumstance that, by the time of that Conference, they would already be in possession of the file submitted to the Trial Chamber by the PTJ pursuant to Rule 65ter(L) (ii). Although no time limit is specified for making the defence filings under Rule 65ter(G), if read in conjunction with Rule 73ter, this provision may imply that such submissions are due at least some weeks in advance of the Pre-Defence Conference so that the Chamber is able to effectively exercise its powers of reducing the defence case. Similarly, the defence at the SCSL may be ordered to make its detailed submissions prior to that Conference, which is to be held before the commencement of its case but after the close of the case for the prosecution. Consequently, the Pre-Defence Conferences at the SCSL have been used for matters such as considering the compliance of the defence with their filing

\[322\] See Chapter 10.
\[323\] Decision on Matthieu Ngirumpatse’s Request for Extension of Time to File Rule 73 ter Materials, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC III, ICTR, 2 April 2008 (‘Ngirumpatse Rule 73ter decision’), para. 5 (‘Rule 73 ter does not envisage holding multiple pre-defence conferences for each accused. Rather, this provision intends to facilitate efficient management of the proceedings by ensuring that key materials are filed prior to the commencement of the Defence’s case.’).
\[324\] Cf. Jones and Powles, International Criminal Practice (n 163), at 695 (‘The object of [Rule 73 ter], as is apparent from its content, is to expedite the trial proceedings by having the Parties agree to the issues in dispute and efficiently to focus the evidence on those issues.’)
\[325\] See Rule 65ter(G) ICTY RPE.
\[326\] E.g. Order Concerning the Preparation and Presentation of the Defence Case, Prosecutor v. S. Milošević, Case No. IT-02-54-T, TC III, ICTY, 17 September 2003, para. 4.
\[327\] Cf. Rule 73bis(B) ICTY RPE (IT/32/Rev. 17, 17 November 1999).
\[328\] Cf. Rule 73bis(B) SCSL RPE (as amended on 13 May 2006).
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obligations; reviewing the witness and exhibit lists and setting the number of witnesses the defence teams are entitled to call; further filtering the matters not genuinely in dispute; and facilitation of the presentation of the defence case. By contrast, the ICTR Rule 73bis(B) still provides that such orders may be made at the Conference itself. To the extent that the Rules reflect the actual practice, this may entail that the Pre-Defence Conferences at the ICTY and SCSL are more likely to be employed by the judges for carrying out their substantive managerial mandate of reducing the Defence case, whereas the analogous Conferences at the ICTR bear a more formal character and rarely occasion fundamental decisions affecting the scope of the Defence case.

It cannot slip one’s attention that the procedure at the Pre-Defence Conference as envisaged in Rule 73ter of the ICTY, ICTR and SCSL RPE to a significant extent rehashes the one prescribed for Pre-Defence Conferences in Rule 73bis. This factor, along with the similarity of the goals of the two types of conferences, obviates the need to have an extended discussion of their rationales. As in the previous paragraph, it is warranted, however, to address the principal differences between the ICTY, ICTR, and SCSL with regard to the scope of defence submissions in connection with the former Conference and the ambit of judicial prerogatives in relation to the defence case and explore the contours of those areas of practice stemming from Rule 73ter that have proven contentious.

b. Pre-defence filings

Rule 65ter(G) of the ICTY RPE mandates the pre-trial Judge, after the close of the Prosecutor’s case and before the commencement of the defence case, to order the defence to make extensive and detailed filings. Save for the pre-trial brief, which is to be filed by the defence prior to the Pre-Trial Conference pursuant to Rule 65ter(F), the volume of the defence materials due before the Pre-Defence Conference is the same as for the Prosecutor’s submissions to the pre-trial Judge under Rule 65ter(E), namely it includes a list of witnesses the defence intends to call and a list of exhibits. The list of witnesses must contain detailed information on the witnesses, and in particular: (a) the name or pseudonym of each witness; (b) a summary of the facts on which each witness will testify; (c) the points in the indictment as to which each witness will testify; (d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count; (e) an indication of the mode of testimony (in person/Rule 92bis/Rule 92quater); and (f) the estimated length of time required for each witness and the total time estimated for presentation of the defence case. In addition, the defence may be ordered to file a list of exhibits that it intends to offer, stating where possible whether the Prosecutor has any objection as to authenticity, the copies of which are also to be served on the prosecutor.

By contrast, at the ICTR and SCSL, the submissions that the defence may be ordered, at the Pre-Defence Conference (ICTR) or prior to it (SCSL), to file are more extensive, in view of the fact that, unlike at the ICTY, it is not expected to file its pre-trial brief nor to make any submissions to the Chamber before trial. Thus, the defence will file its pre-defence brief consisting of: (i) admissions by the parties and a statement of other matters not in dispute; (ii) a statement of contested matters of fact and law; (iii) a witness list with fewer requisite particulars as compared to the requirements at the ICTY (the name or pseudonym of each

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329 E.g. Order Concerning the Preparation and Presentation of the Defence Case, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, TC I, SCSL, 21 October 2005 (‘Norman et al. defence preparation order’), para. 3.
330 Rule 65ter(G)(i) and (ii) ICTY RPE.
331 Inserted as Rule 65ter(G)(i)(d) ICTY RPE (IT/32/Rev. 20, 12 April 2001).
332 Rule 65ter(G)(i)(c) ICTY RPE (IT/32/Rev. 20, 12 April 2001), as further amended on 13 September 2006 (IT/32/Rev. 39).
333 Inserted as Rule 65ter(G)(ii) (f) ICTY RPE (IT/32/Rev. 20, 12 April 2001).
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witness; a summary of facts on, and the points in the indictment to, which each witness will testify; and the estimated time for examination); and (iv) an exhibit list stating where possible the prosecutor’s objections to authenticity. Besides that, the ICTR and SCSL Trial Chambers and designated Judges are granted an explicit power to order the defence to produce to the Chamber and the prosecutor the copies of the written statements of each witness whom the defence intends to call to testify. The ICTY Rules do not authorize the Judges to require the defence to deliver to the prosecution the written witness statements or to divulge them to the prosecutor in a pre-trial or pre-defence stages. Although the approach of ordering such disclosure during the trial, once the witness concerned has testified, has prevailed already in the first case.

This contention surfaced in the reasoning provided for the ICTY decision to reverse its oral ruling to order the disclosure by the defence, during trial, of prior witness statements in Tadić case. The Trial Chamber’s majority denied, subject to Judge Kirk McDonald’s dissent, the prosecution motion to order production of prior statements made by defence witness. Principally in view of the strong ‘adversarial’ inclination of the ICTY proceedings, Judges Stephen and Vohrah adopted the position of some common law jurisdictions, save for the US, that prior statements need not be divulged, firstly, because they fall under the legal professional privilege and, secondly, because only the Defence is entitled to invoke the principle of equality of arms. Judge Kirk McDonald parted ways with the majority on those matters and opined that the production of such statements may be ordered. Based on Rule 54 and the Court’s ‘inherent authority to govern the conduct of the trial after a witness testifies’, the dissent dismissed the majority’s references to the national practices and argued that the ‘cards on the table’ approach served ‘to enhance the truth-finding process that is at the core of all criminal justice systems’ and was not contrary to the principle of equality of arms. It is

335 In the SCSL actual practice, a more detailed information of defence witnesses has been required, see e.g. Norman et al. defence preparation order (n 329), para. 2 and, in the same case, Decision on Prosecution’s Request for Order to Defence Pursuant to Rule 73 ter (B) to Disclose Written Witness Statements, 21 February 2006 (‘Norman et al. Rule 73ter(B) decision’), para. 3 (requiring indication of whether the witness will testify in person or under Rule 92 bis and of the language of testimony); Order for Disclosure Pursuant to Rule 73ter and the Start of the Defence Case, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, TC II, SCSL, 26 April 2006 (‘Brima et al. Rule 73 ter order’), para. 1(a) (requesting, in addition, to specify the order in which the defence teams intend to call the witnesses; whether the accused intend to testify pursuant to Rule 85(C); and common witnesses).

336 Rule 73ter(B) ICTR and SCSL RPE. The power to order the submission of defence witness statements was added at the 8th plenary session on 26 June 2000. The amendments discussed at that plenary focused, among others, on ‘the ways and means of expediting pre-trial and trial proceedings’: see Fifth Annual Report of the ICTR, UN Doc. A/55/345/S/2000/927, 2 October 2000, para. 60.

337 The prosecution motion to order disclosure of these materials at the pre-trial stage had been denied earlier: Decision on the Prosecution Motion to Compel Disclosure of Statements Taken by the Defence of Witnesses Who Will Testify, Prosecutor v. Tadić, Case No. IT-94-1-T, TC, ICTY, 7 May 1996.

338 Decision on Prosecution Motion for Production of Defence Witness Statements, Prosecutor v. Tadić, Case No. IT-94-1-T, TC, ICTY, 27 November 1996.

339 Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, Prosecutor v. Tadić, Case No. IT-94-1-T, TC, ICTY, 27 November 1996 (‘the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused. … [T]his principle is inapplicable in the present case to compel the Defence to make available to the Prosecution the prior statement, … as it would afford the Prosecution the opportunity to peep into the Defence Brief for any incriminating material in breach of the doctrine of privilege which undoubtedly forbids the Prosecution access to the work product of the Defence Counsel.’) See also, in the same case, Separate Opinion of Judge Stephen on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996 (asserting ‘the existing inviolable nature of witness statements in the possession of defence counsel’).

340 Separate and Dissenting Opinion of Judge McDonald, Decision on Prosecution Motion for Production of Defence Witness Statements, Prosecutor v. Tadić, Case No. IT-94-1-T, TC, ICTY, 27 November 1996, para. 6. Judge McDonald was critical of the majority’s reliance on the common law jurisdictions (England, Canada, Australia, Malaysia and South Africa) that recognized a legal professional privilege against the production of defence witness statements, on the ground of their inconsistence with the more progressive ICTY evidence law,
the dissenting position indeed that was consecrated by the ICTY Appeals Chamber in the Tadić Judgement, whereby it was held that the disclosure of prior witness statements at trial may be ordered by the Trial Chamber, because it assists it in the quest for truth among others, and consistently interpreted the equality of arms as the principle that is to benefit both parties equally. Undoubtedly, the same logic must have underlain the adoption of Rule 73ter. In subsequent ICTY cases, the Tadić appeal judgement served as an authority to refuse the prosecution the disclosure of the defence witness statements prior to the commencement of the defence case.

Although being a matter of course when looked at from the angle of the managerial judging model, the power of the judges to order the defence to file its witness and exhibit list with detailed information, including summaries of statements, may appear questionable from an undiluted adversarial perspective, insofar it entails the defence’s having to provide some cues as to the contents of its case before the presentation thereof. However, even before the adoption of Rule 73ter in Čelebići, the ICTY Trial Chamber had ordered, over the defence’s objections, the disclosure to the prosecutor of the list of witnesses as ‘necessary for the proper

see ibid., paras 11-29. She also opined that the equality of arms principle entails the right of the defence to call and examine witnesses under the same—rather than more favourable—conditions as the prosecution, and in the present case, the prosecution witnesses had been cross-examined based on their prior statements: ibid., para. 31. The same conclusion was reached in: Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC, ICTY, 4 February 1998 (‘Delalić et al. disclosure of witnesses decision’), para. 49 (‘an inclination in favour of Defence is tantamount to a procedural inequality in favour of the Defence and against the Prosecution, and will result in inequality of arms. This will be inconsistent with the minimum guarantee provided for in Art. 21 paragraph 4(e), of the Statute.’).

Judgement, Prosecutor v. Tadić, Case No. IT-94-1-A, AC, ICTY, 15 July 1999 (‘Tadić appeal judgement’), paras 322 (ascertaining the inherent power of the Tribunal to order the disclosure of prior statements, to be exercised ‘in its quest for the truth and for the purpose of ensuring a fair trial’) and 323 (‘It would be erroneous to consider that such disclosure amounts to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal’).

Decision on Prosecutor’s Appeal on Admissibility of Evidence, Prosecutor v. Aleksovski, Case No. IT-95-141-AR73, AC, ICTY, 16 February 1999, para. 25 (‘Th[e] application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law of Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.’); Tadić appeal judgement (n 341), para. 48 (‘equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case’) and 52; Prlić et al. time limit appeal decision (n 233), para. 14 (‘Indeed, the principle of equality of arms, falling within the fair trial guarantee under the Statute, applies to the Prosecution as well as the Defence.’) Footnotes omitted.; Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC I, ICTY, 24 May 1998, para. 44 (‘compliance with the specific rights set out in Art. 21 alone may not necessarily guarantee that there has been a fair trial’; ‘a fair trial can only be considered within the plenitude of the trial as a whole’. Footnotes omitted.)

Tadić appeal judgement (n 341), para. 323 (Rule 73ter ‘does not require that the Defence file its witness statements. But the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.’).

Order in Respect of Pre-Defence Filings, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, TC I Section A, ICTY, 12 March 2002 (‘Naletilić and Martinović pre-defence order’), at 3 (‘the Chamber is of the view that the argument by the Prosecution that the Defence is under an obligation to provide them with prior witness statements of Defence witnesses before the Defence case starts is without merit and contrary to the Appeals Chamber’s ruling in the Tadić Appeals Judgement’). See in particular Tadić appeal judgement (n 341), para. 319 (‘there is no blanket right for the Prosecution to see the witness statement of a Defence witness’).
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conduct of the trial and for the effective cross-examination of Defence witnesses by the Prosecution’ and mandated by the equality of arms.\textsuperscript{345}

Since the power to order the production of detailed witness and exhibit lists came to be explicitly provided for at the ICTY, the focus shifted from mere inter-party disclosure to the delivery of information to the Chamber. Curiously, at the ICTR (and the SCSL), the Rule 73ter(B) litigation has continued to hinge on the defence’s disclosure to the prosecutor rather than the delivery to the Chamber. The issues with regard to the defence filing obligations prior to the opening of its case arose regarding the defence’s (timely) compliance with the formal requirements under Rule 65ter(G) of the ICTY RPE and Rule 73ter(B) of the ICTR and SCSL RPE. In particular, the matters of the required specificity of the identifying information and of witness summaries came to the fore. These issues were approached from the angle of the equality of arms between the prosecution and the defence, namely, the possibility for the prosecution to properly prepare for cross-examination.\textsuperscript{346}

The issue of the required identification information has been decided on a case-by-case basis. Thus, in Blaškić, the Trial Chamber ordered the defence to disclose to the prosecution the names and identifying information, including date of birth, domicile, and profession, of its witnesses and the summary of facts to be covered in the testimony, which documents would then be placed on the record by the Registry and submitted to the Chamber.\textsuperscript{347} Relying on the terms of Rule 54 rather than 73ter, it held that it is authorized to ‘take the appropriate measures to ensure that the truth is ascertained in a fair and expeditious trial’, whilst ‘the Prosecution’s prior knowledge of the names and identifying information in respect of the Defence witnesses and the essential point of their testimony will permit the proceedings before the Trial Chamber to be conducted more expeditiously and efficiently’. On the basis of Rule 73ter, it refused the prosecution motion in part of disclosure of the prior statements of the defence.\textsuperscript{348} In Naletilić and Martinović, the ICTY prescribed that for the purpose of Rule 65ter(G), a pseudonym of witness is insufficient unless there are exceptional circumstances, and providing the date of birth would assist the witness identification and thus facilitate the Prosecution’s preparation.\textsuperscript{349}

By comparison, in some ICTR cases, the Tribunal held that Rule 73ter(B) only requires the defence to indicate which witnesses it intends to call at trial, and not their present whereabouts or availability to testify.\textsuperscript{350} However, in many others, the defence was ordered to

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  \item\textsuperscript{345} Delalić \textit{et al.}, disclosure of witnesses decision (n 340), paras 46-7 (‘This measure will not shift the balance of advantage from the Defence, rather it will ensure the observance and maintenance of the parity of opportunity safeguarded by the Statute. ... The Trial Chamber does not agree with the submission of the Defence that granting the application will be assisting the Prosecution. Rather it will be contributing immensely to a fair trial. It will shorten delays and reduce unnecessary and avoidable tension on the victims and witnesses.’) and 49-50 (‘It seems to the Trial Chamber, consistent with the principle of equality of arms, only fair and proper and in the interest of justice for the Defence to give its list of witnesses to enable the Prosecution to answer any issues which might be raised in the Defence.’).
  \item\textsuperscript{346} E.g. Order to the Accused on Protective Measures for Defence Witnesses, \textit{Prosecutor v. S. Milošević}, Case No. IT-02-54-T, TC III, ICTY, 27 May 2004, at 2 (‘it is in the interests of justice and the proper conduct of the trial that the Trial Chamber order the Accused to reveal the identity of the witnesses he intends to call within a reasonable time so as to enable the Prosecution and, if appropriate, \textit{Amici Curiae}, to prepare for cross-examination of the witnesses’).
  \item\textsuperscript{348} Ibid.
  \item\textsuperscript{349} Naletilić and Martinović pre-defence order (n 344), at 3.
  \item\textsuperscript{350} Decision on the Defence Motion for Extension of Time for Filing the List of Defence Witnesses, \textit{Prosecutor v. Semanza}, Case No. ICTR-97-20-T, TC III, ICTR, 4 September 2001 (‘Semanza defence witness list decision’), para. 6; Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses, \textit{Prosecutor v. Nyirumusagukwirwa et al.}, Case No. ICTR-97-21-T, TC II, ICTR, 8 June 2001 (‘information such as the present address of the witness should in any case not be disclosed’); Decision on Prosecution Motion for Full Compliance with rule 73 ter and Variation of Chamber’s Decision of 27 June 2005, \textit{Prosecutor v. C. Bizimungu et al.}, Case No ICTR-99-50-T, TC II, ICTR, 20 November 2006 (‘C. Bizimungu et
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provide all identifying information about its witnesses, including the place of residence and occupation in 1994 and currently, as a way to honour the equality of arms and enable the prosecution to identify a witness and prepare for his cross-examination.351 The Chambers have also ordered that the defence witness list must indicate the sequencing of all witnesses to be called at trial, because ‘it will assist all parties to the proceedings in preparing their respective cases, and will facilitate the conduct of an expeditious trial’.352 Be that it may, the unclear terms of Rule 73ter(B)(iii)(a) concerning identifying information can be addressed by the Chamber through the exercise of its general authority under Rule 54, as the Chamber may define and require disclosure of the details of witness identity and the information relevant to cross-examination.353

As far as the witness summaries are concerned, in Kupreškić et al., the prosecutor requested the Chamber to permit it to interview some of the defence witnesses in order to enable it to prepare for cross-examination, given that the defence summaries filed under Rule 73ter were extremely succinct and failed to convey the substance of their forthcoming testimony.354 The Chamber upheld the prosecutor’s arguments and found that ‘the extremely succinct and summary nature of many defence witness statements does violate the principle of equality of arms, since the prosecution communicated much more detailed prosecution witness statements to the defence and to the Trial Chamber before the presentation of its case, thereby enabling the defence to prepare for cross-examination of prosecution witnesses’.355 In result, the defence was ordered to repair the lack of specificity in the summaries of witness statements, failing which the prosecution would be granted the opportunity to interview the respective witnesses. In the Dragomir Milošević case, the prosecution complained that the non-inclusion of the biographical data into the Defence witness list and non-specificity of the Rule 65ter summaries undermined its ability to prepare for cross-examination. Upon ascertaining the lack of consistent tribunal practice regarding a minimum amount of information to be included in the Rule 65ter summaries of facts, the Trial Chamber affirmed the principle that ‘a party should be able to properly prepare for cross-examination based on

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351 Decision on Sufficiency of Defence Witness Summaries, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 5 July 2005 (‘Bagosora witness summaries decision’), para. 8 (‘The information of particular importance is the witness’s activities in 1994, parentage and birthplace, and country of present residence. The Chamber accepts that the Defence may not be in possession of all this information in respect of each and every witness, but would expect deficiencies to be rare and remedied quickly. Alleged feelings of insecurity by witnesses provide no justification for withholding their place of residence.’); Decision on the Prosecutor’s Motion for Disclosure of Identifying Information Concerning Defence Witnesses Pursuant to Rules 69 (C) and 73 ter, Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, TC II, ICTR, 9 November 2005 (‘Muvunyi defence witnesses disclosure decision’), at 4; Decision on Prosecutor’s Extremely Urgent Motion for Disclosure of Further Identifying Information Relating to Defence Witnesses, Prosecutor v. Ndindiliyimana et al., Case No. ICTR-2000-56-T, TC II, ICTR, 17 April 2007, para. 3 and at 4; Decision on Prosecutor’s Submission Concerning Edouard Karemera’s Compliance with Rule 73ter and Chamber’s Orders, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC III, ICTR, 2 April 2008 (‘Karemera Rule 73ter decision’), para. 8 and, in the same case, Decision on the Prosecutor’s Notice of Deficiencies in Joseph Nzirorera’s Rule 73 ter Filings and Motion for Remedial Measures, 17 February 2009, para. 19. See also Decision on Prosecutor’s Motion to Compel the Defence’s Compliance with Rules 73ter, 67 (C) and 69 (C), Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, TC I, ICTR, 3 October 2002 (‘Nahimana et al. Rule 73 ter decision’), para. 1 (ordering the disclosure of whereabouts).

352 Karemera Rule 73ter decision (n 351), para. 9. See also Kabiligi postponement decision (n 366), para. 11 and Brima et al. Rule 73ter order (n 335).


355 Ibid. See Jones and Powles, International Criminal Practice (n 163), at 696, criticizing this decision as ‘doubtful’ because, in light with previous decisions, ‘the principle of equality of arms is designed to help the defence to achieve procedural parity with the prosecution, and is not meant to be invoked by the prosecution.’

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the other party’s summaries’. As the insufficient level of detail of the defence summaries impeded both the prosecution’s and the judges’ preparation to hear witnesses, the defence was ordered to include minimum biographical details and, after the witness has been proofed, further basic information, including the occupation during the relevant period, rank, unit of deployment, locations and specific incidents the witness is expected to testify about.

The ICTR explicitly required the submission, by way of witness summaries, not merely the subject-matter of proposed testimony, but factual summaries. Similarly to the respective ICTY decisions, the ICTR found that there is no way to determine in the abstract whether the Defence summaries are adequately detailed, since their adequacy can only be established against the actual testimony. The level of detail required from the prosecution witness summaries gives no guidance as to the standard applicable to the defence, since the testimony adduced in defence serves the different purpose of responding to the prosecution evidence. Rather than ordering the defence to corroborate the summaries with more details, the Chamber preferred the approach of remedying any prejudice suffered by the prosecution in result of the testimonial information beyond the contents of the summaries on a case-by-case basis at trial. The same approach was followed by the SCSL in the CDF case, where it was held that an assessment of the defence witness summaries would not be undertaken because it ‘cannot be meaningfully embarked on without the presentation of oral testimonies’.

The original feature of the ICTR (and SCSL) regime unparalleled in the ICTY noted above, is the power of the judges to order the defence to file the written statements of witnesses. At both courts, rendering such an order was deemed as entirely a matter of judicial discretion: the judges are not obliged to do so but nevertheless may, when appropriate in the interests of justice. The SCSL further held that for the prosecution to succeed in its application for disclosure of witness statements, it must demonstrate prima facie evidence that otherwise it would suffer undue or irreparable prejudice. Unlike with the prosecution witnesses, a failure by the defence to disclose the written statements (for example, in case of unavailability or loss) does not automatically result in a removal of the respective witnesses from the list, in view of Rule 73ter.

A final remark concerning the pre-defence filings is that neither ICTY Rule 65ter(G) nor ICTR/SCSL Rule 73ter(B) provide for deadline for the submission of the pre-defence filings, aside from the requirements that such filings be made prior to the Pre-Defence Conference

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356 Decision on the Prosecution’s Motion for Defence Compliance with Rule 65ter (G), Prosecutor v. D. Milošević, Case No. IT-98-29/1-T, TC III, ICTY, 26 June 2007, at 3.
357 Ibid.
358 Nahimana et al. Rule 73ter decision (n 351), para. 1.
359 Bagosora witness summaries decision (n 351), paras 5-6; Karemera Rule 73ter decision (n 351), para. 4 (‘there is no general formulation which can determine whether the Defence summaries are adequately detailed’).
360 Bagosora witness summaries decision (n 351), para. 6.
361 Ibid., para. 5; Karemera Rule 73ter decision (n 351), para. 4.
362 Norman et al. Rule 73ter (B) decision (n 335), para. 14.
363 Transcript, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 18 October 2005 (holding that Rule 73ter does not apply during trial and that it does not mandate judges to order disclosure), as reported in K. Khan and R. Dixon, Archbald International Criminal Courts: Practice, Procedure and Evidence, 2nd ed. (London: Sweet & Maxwell, 2005) 307; Norman et al. Rule 73ter(B) decision (n 335), paras 9; 11-2 (‘it is absolutely clear that The Trial Chamber possesses an undoubted discretion as to whether it is judicially proper to order disclosure to the Prosecution of written statements of each witness the Defence intends to call to testify at the trial’) and 14; C. Bizimungu et al. Rule 73ter decision (n 350), paras 10-11.
364 Norman et al. Rule 73ter(B) decision (n 335), paras 12-3 (‘given the prominence in the presentation of evidence at international criminal trials … of the principle of orality, meaning that the ascertainment of the truth depends primarily upon witnesses being heard at trial in the presence of the accused, it is not perceived to be necessary to insist upon reciprocal disclosure of witness statements on the part of the Defence (especially where the rules do not so stipulate) except where the Prosecution will suffer undue irreparable prejudice by such non-disclosure’).
(ICTY) or after the close of the prosecution case but before the commencement of the defence case (ICTR/SCSL). Thus, the time frame is to be determined by the PTJ or the Chamber, depending on the individual circumstances of the case. However, the filing is to be made sufficiently in advance of the commencement of the defence case to enable the prosecution to effectively prepare for the cross-examination of the defence witnesses and the Chamber for the exercise of its management powers under Rule 73ter.\textsuperscript{366} In multiple accused cases, all accused are expected to make their filings prior to the commencement of the defence case for the first accused, rather than prior to the opening of their individual case.\textsuperscript{367} In view of various circumstances, including ongoing investigations, the need to find substitute witnesses, pending motions and the like, the timely submission of the pre-defence filings has proven to be highly problematic in numerous cases, but in most cases the Trial Chambers were not susceptible to the justifications advanced by the defence.\textsuperscript{368} Partly in response to this problem, as of late, the ICTR developed the practice of ordering the defence to file first a provisional and subsequently a final list.\textsuperscript{369}

c. Judicial powers

The substantive managerial powers exercised by the Trial Chamber at the Pre-Defence Conference (ICTY and, potentially, SCSL) or in its aftermath (ICTR) with a view to reducing the scope and length of the defence case, are analogous to those discharged during or after the Pre-Trial Conference. This is save, of course, for the acts that by definition can only be performed on the Prosecution case alone, such as inviting or directing the prosecutor to reduce the number of counts and fixing a number of crime sites or incidents (Rule 73bis(D)-(E) of the ICTY RPE and Rule 73bis(G) of the SCSL RPE).\textsuperscript{370} The institutional differences between the ICTY, on the one hand, and the ICTR and SCSL on the other—notably with respect to the formalized institute of pre-trial Judge—predetermine slight differences in the way the pre-defence judicial powers are formulated. But in substance they are the same: (i) the power to call upon (ICTY) or order (ICTR, SCSL) the defence to shorten the estimated length of the examination-in-chief for some witnesses;\textsuperscript{371} (ii) the power to set the number of witnesses the defence may call, after having heard it (ICTY) or to reduce it if an excessive number of

\textsuperscript{366} \textit{Semanza} defence witness list decision (n 350), para. 8 (declining to extend the deadline for the submission of pre-defence brief, given the need for the Prosecutor to prepare and for the Chamber to be able to exercise measures reducing the scope of the Defence case under Rule 73ter(C) and (D)). Cf. Decision on Postponement of Defence of Accused Kabiligi, \textit{Prosecutor v. Bagosora et al.}, Case No. ICTR-98-41-T, TC I, ICTR, 21 April 2005 (‘Kabiligi postponement decision’), para. 12 (granting Kabiligi postponement of the deadline for the submission of initial pre-defence brief, in light of the replacement of Counsel).

\textsuperscript{367} \textit{Ngirumpe} Rule 73ter decision (n 323), paras 5-6 (‘this approach … promotes the right of each accused to a fair and expeditious trial, whilst ensuring that they are accorded equal treatment and an opportunity to adequately prepare their defence (by being informed of the defence cases of their co-accused’).

\textsuperscript{368} E.g. \textit{Muvunyi} defence witnesses disclosure decision (n 351), para. 7-6 (the TC condemning ‘in the strongest possible terms’ the failure by the defence to disclose the identifying information about its witnesses); Decision on Joseph Nziroreta’s Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas and Video-Link and on Prosecution’s Motion for an Order to Nziroreta to Reduce His Witness List, \textit{Prosecutor v. Karemera et al.}, Case No. ICTR-98-44-T, TC III, ICTR, 2 December 2008, paras 17-25 (the Defence Counsel’s failure to compile final witness list amounts to abuse of process); Consolidated Decision on Prosecution Oral Motion to Reduce Defence Witness List and Defence Motion to Vary Witness List, \textit{Prosecutor v. Kalimanzira}, Case No. ICTR-05-88-T, TC III, ICTR, 16 January 2009 (‘Kalimanzira defence witness list decision’), para. 5; Decision on the Defence Motions for Additional Time to Disclose Witnesses’ Identifying Information, to Vary Its Witness List…, \textit{Prosecutor v. Rukundo}, Case No. ICTR-2001-70-T, TC II, ICTR, 11 September 2007 (‘Rukundo pre-defence filings decision’), paras 7-8.


\textsuperscript{370} Rule 73ter(B), (C) and (E) ICTY RPE; Rule 73ter(C)-(D) ICTR and SCSL RPE.

\textsuperscript{371} Rule 73ter (B) ICTY RPE; Rule 73ter(C) ICTR and SCSL RPE.
witnesses are being called to prove the same facts (ICTR, SCSL).\textsuperscript{372} However, the power, after having heard the defence, to determine the time available for the presentation of the defence case is only the part of judicial toolkit at the ICTY.\textsuperscript{373}

When performing the managerial prerogatives in relation to the defence case, the Trial Chamber will be guided by the aspiration to reconcile several opposing sets of interests. First is the Chamber’s duty to ensure fair and expeditious proceedings and, in particular, to accord both parties, the prosecution included, with the benefit and protections of the principle of equality of arms. The effort to gain efficiency by taking measures aimed at cutting down the defence witness list or reducing the time for the presentation of its case will nonetheless be restrained by the need for ultimate degree of caution. The right to present his case must be fully observed, whereas the measures of limiting the length of the defence case risk interfere with the defence strategy, impair that party in the presentation of its evidence and, if the outcome will be conviction and sentence, cause irreparable damage to the interests of the accused.\textsuperscript{374} Thus, the judicial orders may not undermine the procedural autonomy of the defence by, for example, micro-managing its case and instructing it what witnesses to call besides setting general limits on the available time and/or number of witnesses.

It bears noting that, according to the explicit prescription at the ICTY, the judicial competence pursuant to Rule 73ter\textsuperscript{(B)} and \textsuperscript{(C)} must be carried out by the Chamber \textit{in the light of} the file submitted by the pre-trial Judge, while the determination of the time available for the presentation of the defence case under Rule 73ter\textsuperscript{(E)} may only be made after having heard that party. This entails that there is an expectation that the decisions pursuant to Rule 73ter will be taken by the Chamber on a considered and informed basis. Whilst the familiarity of the Chamber with the precise contents of the defence’s case-in-chief is not comprehensive, it can nevertheless be sufficient—with the benefit of the knowledge obtained from the pre-defence filings (if they are adequately detailed), from the presentation of the prosecution case-in-chief and the topics raised at cross examination of the prosecution witnesses—to enable the Chamber to reasonably limit the defence case.\textsuperscript{375} Since the defence’s job is ‘merely’ to respond to the indictment, the general familiarity with the contours and likely directions the defence argument will take equips the Chamber fairly well for the assessment of whether the defence case as projected is indeed exclusively focused on the allegations and thus whether its scope is justified. Nevertheless, as the ICTY Appeals Chamber has recognized, an uncertainty remains in the sense that it is impossible to predict with precision the length of the defence case before it begins.\textsuperscript{376}

\textsuperscript{372} Rule 73 ter\textsuperscript{(C) ICTY RPE; Rule 73ter(D) ICTR and SCSL RPE.}
\textsuperscript{373} Rule 73ter(E) ICTY RPE.
\textsuperscript{374} See \textit{Orić} time limit appeal decision (n 247), para. 8 (‘although Rule 73 ter gives the Trial Chamber the authority to limit the length of time and number of witnesses allocated to the defense case, such restrictions are always subject to the general requirement that the rights of the accused pursuant to Art. 21 of the Statute of the International Tribunal be respected.’); Decision on Defendants Appeal against “Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge”, \textit{Prosecutor v. Prlić et al.}, Case No. IT-04-74-AR73.7, AC, ICTY, 1 July 2008 (‘\textit{Prlić et al.} time distribution appeal decision’), para. 16 (‘excessive limitations of time may also compromise the due process rights of the accused’; ‘the considerations of judicial economy should never impinge on the rights of the parties to a fair trial’, footnotes omitted).
\textsuperscript{375} \textit{Prlić et al.} time distribution appeal decision (n 374), para. 59 (rejecting the Petković’s defence’s argument that the Trial Chamber could not make an evaluation of the existence of redundant evidence based on the ‘relatively short summaries’ made under Rule 65ter(G), given the express authorization under Rule 73ter for the Chamber to determine the length of the Defence case based on its review of the 65ter lists and the expectation that the defence show the relevance of the evidence it proposes to adduce); Decision on Mathieu Ngirumpatse’s Appeal from the Trial Chamber Decision of 17 September 2008, \textit{Prosecutor v. Karemera et al.}, Case No. ICTR-98-44-AR73.14, AC, ICTR, 30 January 2009 (‘Ngirumpatse witness list appeal decision’), para. 20 (noting that ‘the Trial Chamber was, to a certain extent, impeded from making a more specific determination of which testimonies were repetitive by Ngirumpatse’s continued failure to provide summaries of the anticipated testimony of many witnesses, on the basis that investigations were still ongoing’).
\textsuperscript{376} \textit{Orić} time limit appeal decision (n 247), footnote 19.
Chapter 8: Trial Preparation

In exercising its discretionary powers of determining the length of the estimated examination-in-chief and the number of witnesses to be called, as well as the time available for the presentation of the defence case, the major challenge for the Trial Chamber is to strike a proper balance between the right of the accused to put his case, the equality of arms, and expeditious proceedings. For the successful implementation of this task, a well-thought-through and principled methodology is indispensable, and the ICTY (and other courts) have been struggling with finding one.

In one category of cases, the admissible scope and length of the defence case were determined arithmetically, whereby the departing points were the correspondent parameters of the prosecution case. In line with the rather straightforward interpretation of the equality of arms principle, the defence is to be granted the same number of witnesses and time for the presentation of its case-in-chief as the prosecution. Thus, in Milošević, the Trial Chamber considered it appropriate to limit the defence case by fixing the days available for the presentation of evidence pursuant to Rule 73ter, because the same method was applied to the Prosecution case. As a matter of principle, the accused would have the same time as the Prosecution had to present his case, meaning 150 sitting days, subject to adjustments depending on the time taken in cross-examination and administrative matters. The same approach was adopted in several other cases, for example, in Lukić and Lukić, the Trial Chamber noted that the number of witnesses proposed by Milan Lukić’s defence was significantly more than the number of prosecution witnesses, whilst it also requested close to triple the time allotted to the prosecution. Considering the requested number of witnesses and amount of time ‘unduly large’, the Chamber ruled that the interests of fair and expeditious trial would be served by allowing the defence for Milan Lukić to keep within the formal numerical limits of the prosecution case. One may wonder whether this egalitarian approach is at all times appropriate, given that in some scenarios, to effectively rebut an accusation advanced by a few prosecution witnesses, the Defence may feel compelled to adduce testimony of many more witnesses.

A different methodology was applied in the Orić case, whereby the Trial Chamber engaged in what was more than broad-brush and mechanical setting of limits and rather approximated to material micro-management analogous to that exercised in relation to the Prosecution case pursuant to Rule 73bis(D). In that case, the defence’s repeatedly refused to reduce the number of its witnesses and the length of time for examination-in-chief—79 witnesses and 249 hours respectively, as compared to 50 witnesses the prosecution had called and 260 hours of court time it had used when presenting its case. At the Pre-Defence Conference, the Trial Chamber invoked Rule 73ter(C) and (E) to give indications of (i) the

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377 Prlić et al., time distribution appeal decision (n 374), paras 15-6 (maintaining that the TC’s decisions under Rule 73ter are trial-management related, discretionary, and thus must be accorded deference by the Appeals Chamber); Ngirumapatse witness list appeal decision (n 375), paras 17-8; Decision on Joseph Kanyabashi’s Appeal against the Decision of trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-AR73, AC, ICTR, 21 August 2007 (‘Kanyabashi witness list variation appeal decision’), paras 10 and 26 (‘the Trial Chamber has the discretion to limit the number of witnesses a party may call’).


379 Ibid., at 3-4 (the Chamber’s calculation was followed on the consideration that the Prosecution spend approximately 360 hours presenting its case in chief, or approximately 90 sitting days. The same time was accorded to the accused, plus two-thirds of that time for cross-examination of the Defence witnesses and administrative matters, totaling to 150 sitting days).


381 Ibid., at 3 (the prosecution was allotted 60 hours and, although it actually used less, the Milan Lukić defence was accorded the same amount of time; the same concerns for the number of the defence witnesses, which was reduced from the requested 124 to 43). The time for the presentation of the case for M. Lukić was further reduced by 2 hours (see Order of Time Remaining for the Examination-in-Chief of Witnesses of the Defence of Milan Lukić, 26 January 2009).
areas of factual evidence it did not require any further evidence about and (ii) its assessment of how the number of defence witnesses could be reduced and the case completed within a specified time-line.\(^{382}\) In particular, it listed the topics, which the proposed defence witnesses were to address, which it regarded as ‘sufficiently addressed during the prosecution case’ (mostly related to the *tu quoque* evidence) and thus requiring no further defence evidence on those issues.\(^{383}\) Consequently, the defence was ordered to refrain from adding such evidence and to file a new witness list with no more than 30 witnesses.

On the interlocutory appeal from that decision, the Appeals Chamber did not dismiss the topical restrictions as a fundamentally wrong methodology. It ruled that some of the topics—especially those related to the general background of the conflict—were ‘defensible as a reasonable exercise of the Trial Chamber’s Rule 73ter responsibility to “set the number of witnesses the defence may call” and “determine the time available to the defense for presenting evidence”’, whilst other restrictions were ‘unreasonable in light of the fact that the defense of military necessity may play a central role in Orić’s defence’.\(^{384}\) Thus, unless the Trial Chamber was prepared to reconsider its Rule 98*bis* judgment and acquit the accused in part, it was obliged to give the accused ‘a reasonable opportunity to present reliable and relevant evidence’ on the relevant issues.\(^{385}\)

The second important contribution by the Appeals Chamber was that it addressed the test for balancing the defence case against that of the prosecution, based on the interpretation of the equality of arms principle that transcended the formal (egalitarian) approach and hinged on ‘proportionality’ instead of ‘equality’. It ruled that while the principle ‘obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case’, it does not entail that an Accused is necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution. The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution’s case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides. … [I]n addition to the question whether, relative to the time allocated to the Prosecution, the time given to the Accused is reasonably proportional, a Trial Chamber must also consider whether the amount of time is objectively adequate to permit the Accused to set forth his case in a manner consistent with his rights.\(^{386}\)

This test has been upheld by the ICTY and ICTR Appeals Chamber and followed by the Trial Chambers in later cases.\(^{387}\) Moreover, in *Prlić et al.*, it was ruled that the application of


\(^{383}\) *Ibid.* (listing 11 topics, among which the historical and political background which led to the armed conflict in BiH in April 1992; the large number of attacks by Bosnian Serbs on Bosnian Muslim villages; the killing and inhumane treatment of Bosnian Muslims by Bosnian Serbs; ethnic cleansing; the situation in and around Srebrenica and the 1995 genocide, etc.).

\(^{384}\) *Orić* time limit appeal decision (n 247), para. 6.

\(^{385}\) *Ibid.* The appellate bench included a caveat that this did not entail that Orić would be ‘free to present unnecessarily repetitive or irrelevant evidence just because it arguably fits within these categories’.

\(^{386}\) *Ibid.*, para. 7.

\(^{387}\) *Prlić et al.* time distribution appeal decision (n 374), para. 16. See e.g. *Kanyabashi* witness list variation appeal decision (n 377), paras 21 and 26 (‘all parties are not entitled to call precisely equal numbers of witnesses’); Order to Joseph Nzirorera to Reduce his Witness List, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, TC III, ICTR, 24 October 2008 (‘Nzirorera witness list order’), para. 6; *Ngirumpatse* witness list appeal decision (n 375), para. 23 (the TC must consider the complexity of the defence case and satisfy itself that the maximum time and number of witnesses allotted to the accused is sufficient to allow him a fair opportunity to present his defence). See also *ibid.*, para. 30. The AC stated, with reference to *Orić*, that although the
the methodology for the allocation of time to the defence based on ‘purely arithmetical calculation’ may amount to ‘an abuse of the Trial Chamber’s discretion’. At the same time, one might question whether some aspects of the appellate bench’s interpretation of the principle of equality of arms are in line with the letter and spirit of Article 20(4) of the ICTY and human rights standards. Those provide that the minimum guarantees—including that ‘to examine, or have examined, the witnesses against him … under the same conditions as witnesses against him’—to be enjoyed by the accused ‘in full equality’ rather than ‘in full proportionality’. Certainly on purpose not dubbed as ‘proportionality of arms’, the principle of equality of arms in criminal proceedings has been authoritatively construed as affording ‘each party … a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent’. Normally, some showing of a specific prejudice is required for the finding of the violation of the equality of arms. But arguably, even if deemed ‘proportional’ in view of certain parameters, any preset and sheer disparity in the numbers of witnesses that the parties are allowed to call or in the time available to each of them for presenting their respective cases would per se fail to meet the requirement of the ‘same conditions’ and hence undermine the ‘equality of arms’. This is especially so where, as in most cases, the ‘proportional’ disparity works to the disadvantage of the accused. Be that as it may, the criticism against the Appeals Chamber’s methodology proffered and applied in the Orić case, can be mounted only in abstracto, given the substantive outcome of that particular decision.

In particular, further on the Appeals Chamber proceeded to examining whether it would be satisfied that the amount of time and the number of witnesses allocated to Orić’s defence are reasonably proportional to the prosecution’s allocation and sufficient to grant him a fair opportunity to put his case, given the complexity of the remaining issues. It found that the requirement that the accused present 30 witnesses within 9 weeks is ‘not remotely proportional’ to the opportunity the prosecution availed of when presenting its case – 50 witnesses in 100 days of testimony, especially after it struck down most subject-matter restrictions which lead to the expansion of the territory to be covered by the defence. In conclusion, the Appeals Chamber reversed the trial decision and remanded the case to the prosecution used over 170 days for its 29 witnesses, the TC’s decision to grant Ngirumpatse 35 days for 40 witnesses was ‘proportional’, because ‘strict proportionality in time is not required’.

388 Orić et al. time distribution appeal decision (n 374), para. 19.
389 Art. 6(3) ECHR (‘Everyone charged with a criminal offence has the following minimum rights: …(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’); Art. 14(3) ICCPR (‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’).
390 Judgment, Bulut v. Austria, Application No. 17358/90, ECHR, 22 February 1996, para. 47. Cf. Dombo Beheer B.V. v. Netherlands, Judgment, Application No. 14448/88, ECHR, 27 October 1993, para. 33 (‘the requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to such cases as well as to criminal cases’; ‘as regards litigation involving opposing private interests, “equality of arms” implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.’).
391 S. Trechsel, Human Rights in Criminal Proceedings (Oxford: Oxford University Press, 2005) 99 (‘any departure from the maintenance of a strict policy of equality between the prosecution and the defence will not automatically mean that the trial was unfair; some sort of detrimental effect on the defence will have to be shown’), referring to Kremzow v. Austria, Judgment, Application No. 12350/86, ECHR, 21 September 1993, para. 75 (given that ‘the defence was not in any way prejudiced by the difference’, finding no violation of Art. 6(1) ECHR). Cf. Bulut v. Austria judgment (n 390), para. 49 (‘the principle of equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality’); Lanz v. Austria, Judgment, Application No. 24430/94, ECHR, 31 January 2002, para. 58. See also Trechsel, ibid., at 98 (‘In a sense, equality of arms might also have an absolute aspect in that any inequality which is to the detriment of the defence will lead to a violation of the right to fair proceedings, irrespective of whether the defence can show that it suffered any prejudice.’).
392 Ibid., para. 9 (‘the disparity in this instance is so great that no specific prejudice need be shown’).
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Trial Chamber, after having instructed the trial bench to recalculate the time available for the presentation of the defence case for Orić and to even allow him the opportunity to restart his case-in-chief and recall certain witnesses, given that the trial proceeded ‘under the cloud of uncertainty’ pending the appellate decision. In this regard, the Appeals Chamber’s decision is an illustrative example of dangers to the fair and efficient proceedings that lurk in the well-meaning yet excessively restrictive judicial decisions aimed to contain the Defence case.

The allocation of time for the presentation of the defence case-in-chief with help of the ‘reasonable proportionality’ standard has proven to be contentious in multi-accused cases, in which the need to ensure fairness and expeditiousness of trial proceedings required a particularly delicate balancing of interests. For the one thing, the difficulty with this category of cases is that of finding and preserving—in addition to the balance between the overall length of the presentation of the defence evidence and the prosecution case—the proper correlation between the cases for each individual accused. The share of time to be granted to each defence team must be in proportion with quantum of the prosecution evidence adduced against each respective accused. This, of course, presupposes that the Trial Chamber has a solid knowledge of the prosecution case. For the other thing, the Chamber must ensure that none of the accused will be prejudiced as a result of a joint trial and that everyone will get a reasonable opportunity to put on his case.

One could think of at least two approaches that could be taken by the Trial Chambers faced the task of setting the time limits for the presentation of the defence case in joint trials. The first approach, first taken by the ICTY Trial Chamber in Milutinović et al., is to determine the total amount of time available for the presentation of the defence cases while leaving to the teams themselves to decide how to distribute it amongst themselves. However, there is a significant chance of course that, constrained by a general time line, the defence teams will be unable to agree on the allocation of time between themselves, as it indeed happened in that case. In that event, the Chamber would have to render respective orders, and thus the question of an appropriate constructive approach remains.

393 Ibid., para. 10 (‘If the Trial Chamber had allocated more time for Orić’s case in the first instance, his strategy with the witnesses presented so far—both in terms of the subject matter discussed and it terms of the amount of time taken for examination—might have been very different. It is therefore only fair to allow Orić, should he so choose, to put these witnesses on again in order to fully address all issues that he deems necessary. While such re-examination will very likely re-cover some old ground, the Appeal Chamber cautions the Defense that it should not abuse this right, but should focus on the relevant issues of its case.’).
394 Kanyabashi witness list variation appeal decision (n 377), para. 24; Ngirumpatse witness list appeal decision (n 375), para. 29.
395 See Prlić et al. time distribution appeal decision (n 374), para. 39 (‘In a case with multiple accused, the issue of proportionality is affected not only by the burden of proof upon the Prosecution, but also by the circumstances that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual Accused. The Appeals Chamber defers to the Trial Chamber’s knowledge of the Prosecution case and to its assessment of the proportion between the time allocated to an individual accused and the time used by the Prosecution to address the responsibility of that Accused’); Ngirumpatse witness list appeal decision (n 375), para. 30 (‘this is a multi-accused trial, and … therefore the case of the Prosecution, which has the burden of proving the liability of each accused beyond a reasonable doubt, may well be longer than the defence of any individual accused.’).
396 Rule 82(A) ICTY RPE (‘In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.’). See also Rule 82(A) ICTY and SCSL RPE.
397 Decision of Use of time Remaining for Defence Phase of Trial, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC I, ICTY, 21 November 2007, para. 1 (the Chamber ruled that the Defence teams would have a total of 240 hrs. for presenting their cases. While it considered that this time period should be equally apportioned among the accused, it ‘expressed hope that the Accused would reach agreement on the ultimate allocation of time between themselves’).
398 Ibid., para. 3.
399 Ibid., para. 6 (distributing the remaining 145 hrs. for the presentation of the defence case between the Lazarević and Lukić Defences in the proportion 45% versus 55% respectively, for the reason that the former accused was the only accused from the Ministry of Interior and thus had ‘a little bit more work to do in defence’).
Later in the Prlić et al. case, Trial Chamber III distributed the time among the six defence teams in Prlić et al., relying upon ‘a thorough examination of each 65ter List submitted by the defence and not a strictly mathematical calculation of time allocation’. In particular, in the context of examination of the projected cases for each accused, it considered whether there was a failure to have recourse to the 92bis through quater procedures; the repetitiveness of certain testimony; the excessive time allocated for certain testimony; and whether any witnesses were called to testify on acts and facts not relating to the charges or relating to them only very loosely. The Chamber also stated that the time allocation could subsequently be modified; in anticipation of the requests for leave to appeal the decision, the Trial Chamber granted such certification in advance.

The Appeals Chamber dismissed all grounds of appeal and found the application of the method by the trial judges in the determination of the amount of time for the presentation of each case for the individual accused to comply with the professed standard and to be ‘a reasonable exercise of the Trial Chamber’s discretion’ under Rule 73ter. The appellate bench seized the opportunity to rebuke the method-related arguments advanced by the defence teams. Thus, in response to the complaint regarding the Trial Chamber’s demonstrated preference for alternatives to viva voce evidence, the Appeals Chamber confirmed that the Trial Chamber ‘was entitled to assume that the parties would present their cases as efficiently as possible and take advantage of the options available to them to reduce the time for presenting evidence’. Similarly, the argument that the determinations concerning the redundancy or repetitiveness of the proposed evidence should be made during the presentation of the defence case rather than earlier, was not deemed persuasive. On the contrary, the Appeals Chamber pointed that such assessment indeed could effectively be made based on the 65ter list, being not only reasonable but also beneficial in terms of ensuring certainty and enabling the defence to organize its strategy in advance. Furthermore, the Praljak defence challenged that the time allocation by the Trial Chamber was ‘reasonably proportional’ to the time allowed to the Prosecution (17.4%), with reference to the above-mentioned Orić appeal decision, which recognized the 27%-proportion as indicative of inadmissible disparity. The Appeals Chamber dismissed the relevance of that single-accused case, explaining that factors such as the presence of multiple accused make any strict numerical comparison to previous cases inapposite. In a case with multiple accused, the Prosecution is to divide the time allowed for the presentation of its case in order to prove the guilt of each individual accused for each of the crimes charged. Consequently, each individual accused is unlikely to challenge every piece of evidence presented by the Prosecution.

Similarly to the ICTY, the ICTR Trial Chamber have consistently strived to restrain the defence in using excessive time to put on their case, by limiting the time available for the examination-in-chief. However, to a greater extent than the ICTY and SCSL, the ICTR

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400 Decision Allocating Time to the Defence to Present Its Case, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC II, ICTY, 25 April 2008, para. 12. The result of that assessment was as follows: 95 hrs. (Prlić), 59 hrs. (Stojić), 55 hrs. (Praljak), 55 hrs. (Petković), 50 hrs. (Ćorić), and 22 hrs 30 min. (Pušić), totaling 336 hrs. and 30 min., compared to the Prosecution’s 316 hrs (actually used 296 hrs.): ibid., paras 8-9 and 44.
401 Ibid., paras 13 and 16.
402 Ibid., paras 45-6.
403 Prlić et al. time distribution appeal decision (n 374), paras 19-21.
404 Ibid., para. 23.
405 Ibid., paras 24-5.
406 Orić time limit appeal decision (n 247), para. 22; Prlić et al. time distribution appeal decision (n 374), para. 32.
407 Ibid., paras 45-6.
408 E.g. Consolidated Decision on Prosecution Motion Concerning Defence Compliance with Rule 73ter and Defence Motions to Vary Witness Lists, Prosecutor v. Kalimanzira, Case No. ICTR-05-88-T, TC III, ICTR, 12 November 2008, para. 4 (the Trial Chamber found the estimate of 90 hours for testimony of 30 witnesses...
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Trial Chambers have made use of their power of ordering the defence to reduce their witness list to avoid excessive testimony intended to prove the same facts, pursuant to ICTR Rule 73ter(D). One possible explanation for this is that the ICTR Trial Chambers receive full copies of witness statements as a matter of law. This power enables them to perform a closer management of the defence case than merely setting time-limits, by flagging and sifting out repetitive testimony more decisively.

Thus, in Nahimana et al., the Trial Chamber affirmed that it had the ‘final control on the number of witnesses’ and clarified that, in taking respective decisions, it would ‘look at the summaries and watch out for aspects such as whether issues are in dispute, whether they can be admitted by prosecution and also whether there is duplication of testimony’. In Karemera et al., the Chamber held that the Ngirumpatse defence will have around 40 days (6-hours per sitting day) to present its witnesses, but following the submission of the amended list of 354 witnesses, ordered the reduction thereof to 35 witnesses. In considering the interlocutory appeal, the Appeals Chamber deferred to the Trial Chamber’s discretion in determining that this amount of time and number of witnesses are objectively adequate to permit the accused to put on his case. An analogous order was addressed to co-accused Nzirorera, whose proposed number of witnesses and time for the presentation was deemed by the Chamber ‘not even remotely proportional’ to those of the Prosecution, given that on several areas excessive evidence was proposed. In joint trials, the motive underlying the judicial orders for reduction of what were deemed excessive witness lists was manifested by a reference to the need ‘to preserve the right of all Accused persons … to be tried without undue delay’ and to the interests of judicial economy, without further discussion, however, of its relation to Rule 82(A) of the ICTR RPE.

The final question to be addressed in connection with the Pre-Defence Conferences, is the right of the defence to move the Chamber, and the correspondent power of the trial Judges, to revisit the decisions regarding the application of the managerial measures to the Defence case. In particular, Rule 73ter(D) of the ICTY, ICTR, and SCSL authorizes the defence after the commencement of its case and if it considers it to be in the interests of justice, to file a motion to reinstate the list of witnesses or to vary the decision as to which

exaggerated and instructed the parties to limit examination in a way permitting to complete the Defence case in 20 trial days).

409 E.g. Order for the Defence to Reduce its List of Witnesses, Prosecutor v. Ntawukulilayo, Case No. ICTR-05-82-T, TC III, ICTR, 21 August 2009 (indicating that an excessive number of witnesses (30) are proposed to testify on the accused’s good character and the assistance he provided to Tutsi in 1994) and, in the same case, Decision on Defence Motion for Leave to Vary its Witness List to Add Three Witnesses…, 30 September 2009 (‘Ntawukulilayo defence witness list decision’), paras 27-9; Nyiramasuhuko et al. scheduling order (n 369), at 3. For a (rare) example of the ICTY decision of relevance, see Order on Prioritizing Defence Witnesses, Prosecutor v. Krajišnik, Case No. IT-00-39-T, TC I, ICTY, 9 February 2006 (reiterating preference for hearing the ‘most important’ and ‘most relevant’ witnesses and ordering the Defence to re-file a witness list indicating the order of preference based on importance and relevance, with expected necessary measures towards ensuring their attendance).

410 Decision on the Defence’s Extremely Urgent Motion to Reconsider the Scheduling Order Dated 26 March 2003 on the Following Direction for the Remaining Defence Factual Witnesses, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, TC I, ICTR, 11 April 2003, paras 19-21 (refusing to hear the ten factual witnesses for Ngeze, because the likely subject-matter of their testimony would cover the topics explored earlier).


412 Ngirumpatse witness list appeal decision (n 375), para. 27.

413 Nzirorera witness list order (n 387), paras 7-8.

414 Decision on Prosper Mugiraneza’s Motion for Leave to File Documents Out of Time and Order for Further Reducing of Witness List. Prosecutor v. C. Bizimungu et al., Case No. ICTR-99-50-T, TC II, ICTR, 20 February 2008, para. 16 (ordering to reduce the list in relation to the categories of witnesses to testify about the same incidents).
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witnesses are to be called. \textsuperscript{415} Moreover, at the ICTY, the Trial Chamber may grant a defence request for additional time to present evidence of this is in the interests of justice. \textsuperscript{416} The phrase ‘after the commencement of its case’ must be interpreted as referring to the defence case as a whole, which became relevant in joint trials where the defence occasionally argued that it may amend its witness list without the Chamber’s permission up till moment when the individual case for their client commences. But it was ruled that the obligation under Rule 73\textit{ter} to request leave to amend witness list arises as soon as the defence case as a whole commences.\textsuperscript{417}

Like in the context of the Rule 73\textit{bis} assessment, the standard applied at the ICTY in considering defence motions for variation of witness lists has been that of the ‘interests of justice’. \textsuperscript{418} The balancing exercise is to be carried out by the Chamber between the right to present the available evidence during the defence case and the rights of the prosecution and any co-accused to have adequate time and facilities to prepare their respective cases. \textsuperscript{419} The parameters of importance for weighing by the judges in relation to the testimony proposed for addition are, like for the analysis under Rule 73\textit{bis}, the \textit{prima facie} relevance and probative value; the existence of good cause for, i.e. no lack of due diligence in, not seeking to add the witness earlier; and the burden on, and possible prejudice for, the other parties. \textsuperscript{420} The examples of a showing of a good cause include the situations where witnesses have only recently become available to testify or where the relevance of their testimony has only recently become apparent. \textsuperscript{421} In deciding upon the defence motions for the amendment of exhibit lists, the Chambers have likewise required a good cause and took into account the relevance and probative value of the proposed new exhibits. \textsuperscript{422}

As compared to the ICTY practice, considerably more requests for leave to amend witness lists under Rule 73\textit{ter}(D) were filed by the defence before the ICTR, giving rise to an extensive—but substantively not very different—case-law on the matter. At the ICTR (and SCSL), in addition to the formula of ‘interests of justice’, \textsuperscript{423} the standard set in Rule 73\textit{ter}(E)

\begin{itemize}
\item \textsuperscript{415} Rule 73\textit{ter}(D) ICTY RPE; Rule 73\textit{ter}(E) ICTR and SCSL RPE.
\item \textsuperscript{416} Rule 73\textit{ter}(E) ICTY RPE.
\item \textsuperscript{417} Decision on Alphonse Nteziryayo’s Motion to Modify His Witness List, \textit{Prosecutor v. Nteziryayo}, Case No. ICTR-97-29A-T, TC II, ICTR, 14 July 2006 (‘Nteziryayo witness list decision’), para. 24; Decision on Nzuwonemeye’s Request to Vary his Witness List, \textit{Prosecutor v. Ndindillyimana, A. Bizimungu, Nzuwonemeye, and Sahaguta}, Case No. ICTR-2000-56-T, TC II, 31 January 2008 (‘Nzuwonemeye witness list decision’), para. 2 (‘in a case with multiple accused, the Defence case as a whole effectively starts with the presentation of the first accused’s defence.’).
\item \textsuperscript{418} Decision on Defence Motions to Amend the Witness List (confidential), \textit{Prosecutor v. Lukić and Lukić}, Case No. IT-98-32/1-T, TC III, ICTY, 3 February 2009 (‘Lukić and Lukić witness list decision’), para. 14, cited in Decision on Čermak’s Defence Motion to Add a Witness to Its Rule 65 \textit{ter} (G) Witness List, \textit{Prosecutor v. Gotovina et al.}, Case No. IT-06-90-T, TC I, ICTY, 17 July 2009 (‘Čermak I witness list decision’), para. 3 and, in the same case: Decision on Čermak’s Defence’s Second and Third Motions to Add a Witness to its Rule 65 \textit{ter} (G) Witness List, 22 September 2009 (‘Čermak II witness list decision’), para. 7 and Decision on Čermak Defence’s Fourth Motion to Amend the Rule 65 \textit{ter} (G) Witness List, 15 October 2009 (‘Čermak III witness list decision’), para. 3.
\item \textsuperscript{419} Redacted Version of “Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 \textit{quater}”, Filed Confidentially on 18 December 2008, \textit{Prosecutor v. Popovic et al.}, Case No. IT-05-88-T, TC II, ICTY, 19 February 2009 (‘Popovic et al. Rule 92 \textit{quater} decision’), para. 36; Lukić and Lukić witness list decision (n 418), para. 15; Čermak I witness list decision (n 418), para. 3; Čermak II witness list decision, \textit{ibid.}, para. 7; Čermak III witness list decision, \textit{ibid.}, para. 3.
\item \textsuperscript{420} Milošević defence preparation order (n 326), para. 6 (‘good cause’); Popovic et al. Rule 92 \textit{quater} decision (n 419), para. 36; Čermak I witness list decision (n 418), para. 3; Čermak II witness list decision, \textit{ibid.}, para. 7; Čermak III witness list decision, \textit{ibid.}, para. 3.
\item \textsuperscript{421} Čermak I witness list decision (n 418), para. 3; Čermak II witness list decision, \textit{ibid.}, para. 7; Čermak III witness list decision, \textit{ibid.}, para. 3.
\item \textsuperscript{422} Decision on Defence Motion to Amend Rule 65\textit{ter} Exhibit List and on Defence Motion for Admission of Defence Exhibits, \textit{Prosecutor v. Halilović}, Case No. IT-01-48-T, TC I, Section A, ICTY, 8 August 2005, at 3.
\item \textsuperscript{423} Decision on the Defence Motion to Modify the List of Defence Witnesses for Arsène Shalom Nuhobali, \textit{Prosecutor v. Nyiramasuhuko et al.}, Case No. ICTR-98-42-T, TC II, ICTR, 26 August 2005 (‘Nyiramasuhuko et
has consistently been construed as requiring the showing of a good cause,\textsuperscript{424} thus amounting to a two-pronged test. However, the ICTR held in \textit{Nahimana} (and the SCSL followed in \textit{Taylor}), while the good cause standard formally applies to the prosecution by virtue of Rule 66(A)(ii), there is no similar provision in respect of the defence disclosure, which entails that a showing of ‘good cause’ by the defence is not required.\textsuperscript{425} Hence, the likely reason underpinning the mainstream practice is the aspiration to attain equality of arms between the parties and analogy with Rule 73bis. Similarly to the variation of prosecution witness lists, the ‘interests of justice’ and ‘good cause’ analysis by the ICTR Chambers hinges upon a wide host of factors, requiring a strictly individual and close scrutiny of each and every proposed witness.\textsuperscript{426} The ICTR jurisprudence has been consistent in recognizing as relevant the following criteria, among others: namely, the potential importance of the testimony in relation to the existing witnesses and allegations in the indictment; any prejudice or element of surprise to the opposing party, affecting in particular, the prosecution’s ability to prepare for cross-examination; the legitimacy of the reasons and the timing of the variation of the witness list; the timing and sufficiency of the disclosure of witness information; the complexity of the case; the stage of the proceedings and potential delay in the proceedings.\textsuperscript{427} In part of the

\textit{al.} witness list decision”), para. 31 and \textit{Nteziryayo} witness list decision (n 417), para. 27; Decision on Accused’s Motion to Expand and Vary the Witness List, \textit{Prosecutor v. Muvunyi}, Case No. ICTR-2000-55A-T, TC II, ICTR, 28 March 2006 (‘\textit{Muvunyi} witness list decision’), para. 11.\textsuperscript{428} See, among others, Decision on Nsengiyumva Motion for Leave to Amend Its Witness List, \textit{Prosecutor v. Bagosora et al.}, Case No. ICTR-98-41-T, TC I, ICTR, 6 June 2006, para. 3 and, in the same case, Decision on Defence Motion to Amend the Defence Witness List, 17 February 2006, para. 4; Decision on the Defence Motion to Vary the Defence Witness list to Add M. Gaspard Musabyimana, \textit{Prosecutor v. Zigiranyirazo}, Case No. ICTR-2001-73-T, TC III, ICTR, 13 April 2007 (‘\textit{Zigiranyirazo} witness list decision’), para. 2; Decision on Casimir Bizimungu’s Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony, \textit{Prosecutor v. C. Bizimungu et al.}, Case No. ICTR-99-50-T, TC II, ICTR, 1 May 2009 (‘\textit{C. Bizimungu} defence witness list’), para. 13; \textit{Ntawukulilayo} defence witness list decision (n 409), para. 9; Decision on Defence Request to Amend Witness List, \textit{Prosecutor v. Renzaho}, Case No. ICTR-97-31-T, TC I, ICTR, 12 July 2007 (‘\textit{Renzaho} witness list decision’), para. 3; Decision on Fofana Application for Leave to Call Additional Witnesses, \textit{Prosecutor v. Norman et al.}, Case No. SCSL-04-14-T, TC I, SCSL, 17 July 2006, at 3.\textsuperscript{429} Decision on the Defence’s Application under Rule 73ter(E) for Leave to Call Additional Defence Witnesses, \textit{Prosecutor v. Nahimana}, Case No. ICTR-99-52-T, TC I, ICTR, 9 October 2002 (consequently, considering only that ‘the proposed witness would provide relevant material evidence which it would be in the interests of justice to receive, and that the calling of an additional witness would not result in a prejudicial delay in the present case’); Decision on Defence Motion for Leave to Vary Version III of the Defence Rule 73ter Witness List and Summaries, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-1-T, TC II, SCSL, 22 January 2009 (‘\textit{Taylor} witness list decision’), at 3 (‘the “good cause” standard is not applicable to a defence request to add witnesses pursuant to Rule 73ter(E), and … the Defence need only demonstrate that such addition is “in the interests of justice”’).\textsuperscript{430} Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List, \textit{Prosecutor v. Bagosora et al.}, Case No. ICTR-98-41-T, TC I, ICTR, 17 November 2006 (‘\textit{Bagosora et al.} witness list decision’), para. 2; Decision on Kanyabashi’s Motion to Vary his List of Witnesses Pursuant to Rule 73ter, \textit{Prosecutor v. Nyiramasuhuko et al.}, Case No. ICTR-98-42-T, TC II, ICTR, 15 February 2008, para. 31 and, in the same case, Decision on Ndayambaje’s Motion to Vary his List of Witnesses, 15 April 2008, para. 10; Decision on Ndayambaje’s Motion to Vary his List of Witnesses, 4 June 2008, para. 11.\textsuperscript{431} See e.g. Decision on the Defence Motion to Re-Instate the List of Witnesses for Ferdinand Nahimana, Pursuant to Rule 73ter, \textit{Prosecutor v. Nahimana et al.}, Case No. ICTR-99-52-T, TC I, ICTR, 13 December 2002; \textit{Muvunyi} witness list decision (n 423), para. 11; Decision on Augustin Bizimungu’s Request to Vary His Witness List, \textit{Prosecutor v. Ndindilyimana et al.}, Case No. ICTR-00-56-T, TC II, ICTR, 24 October 2007, para. 3 and, in the same case, \textit{Nzgawaneye} witness list decision (n 417), para. 3; \textit{Kalimanzira} defence witness list decision (n 368), paras 7 and 10; C. Bizimungu defence witness list (n 424), para. 13; Bagosora et al. witness list decision (n 426), para. 2; \textit{Ntawukulilayo} defence witness list decision (n 409); paras 9-10; \textit{Rukundo} pre-defence filings decision (n 368), para. 10; Decision on the Defence Motion to Vary the Defence Witness List, \textit{Prosecutor v. Zigiranyirazo}, Case No. ICTR-2001-73-T, TC III, ICTR, 28 March 2007, para. 3; \textit{Zigiranyirazo} witness list decision (n 424), para. 2; Decision on Kanyabashi’s Three Motions to Vary his List of Witnesses and to Admit Written Statements under Rule 92 bis, \textit{Prosecutor v. Nyiramasuhuko et al.}, Case No. ICTR-98-42-T, TC II, ICTR, 24 April 2008, para. 39; \textit{Nyiramasuhuko et al.} witness list decision (n 423), para. 32; \textit{Renzaho} witness list decision (n 424), para. 3; \textit{Nteziryayo} witness list decision (n 417), para. 27; Decision on Prosper Mugiraneza’s
factors considered relevant for the purpose of the Rule 73ter(E) assessment, the SCSL practice did not diverge from that of the ICTR in any significant respect.  

Lastly, to complete the overview of the Rule 73ter practice before the three courts at hand, a remark should be made on the unique to the ICTY procedural regime provision of that Rule’s paragraph (F), which is bound to be limited due to the scarcity of the jurisprudence. As mentioned, that sub-Rule authorizes the Chamber to grant a defence request for additional time to present evidence if this is in the interests of justice. In a single (publicly available) ICTY decision on the matter known to this author, the Trial Chamber refused to grant the accused additional time for calling further witnesses in his defence. In that case, marred with ineffective representation by and subsequent dismissal of counsel halfway through trial preparation, the accused argued that he had not been given adequate time to present his case, leading to the unfair outcome, and that the Chamber did not operate in the letter and spirit of Rules 65ter and 73ter.

The Chamber held that it must grant time additional to that already allocated if the party had not had ‘a fair opportunity to prepare and present its case’. The argument by the accused that he had only used 60% of time taken by the prosecution whilst he was entitled to at least 70%, was dismissed by the Chamber as irrelevant, given that ‘[t]he adequacy of time allocation is not a question of finding the correct mathematical formula’. Instead, the factors deemed by the Chamber relevant were the actual consumption of time in court, the overall allocations of time to the defence for preparation and presentation of its case, the actual time spent out of court on the preparation, the relevance of the proposed evidence, and the considerations of the proper administration of justice militating against delays. Against these parameters, the Chamber held that the defendant had had a fair opportunity to put his case and that allotting extra time was not in the interests of justice, in light of the previous flexibility of the Chamber in relation to the defence’s schedule and otiose character of proposed evidence.

3.3 ICC

3.3.1 Introductory remark

As the previous Chapter has shown, the trial at the ICC is preceded by a number of preparatory steps. Those take place following the constitution of the Trial Chamber by the Presidency to conduct subsequent proceedings, the referral to it of the case, and the transmittal of the confirmation decision and of the record of the proceedings to that Chamber,
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pursuant to Article 61(11) of the ICC Statute and Rule 130. 435 This is due to the fact that the confirmation of the charges is a procedure unto itself and the conclusion of the pre-trial stage does not render the case automatically trial-ready. 436 In view of the scope of the Chamber’s competences at that stage and the volume of work to be done by it in coordination with the parties and the participants, it is difficult to overestimate the importance of the preliminary trial proceedings before the Chamber. For these are the formative steps that not only lay down the basis for and predetermine the pace of the forthcoming trial. 437 They also secure the very possibility of holding one in a fashion that would satisfy the tenets of fairness.

This can be illustrated by the exercise of the power of the Chamber to provide for the disclosure of evidence and by how this prerogative played out in the first practice in the ICC Lubanga case. The trial remained under the cloud of uncertainty and on the brink of cancellation, after the charges against the accused had been confirmed, due to the impossibility for the Chamber to properly carry out its obligations of effecting disclosure of the exculpatory evidence prior to the commencement of the trial, occasioned by the prosecutor’s inappropriate use of the confidentiality agreements foreseen in Article 54(3)(e) of the Statute. 438

Besides the essential character of the trial-preparatory activities for the successful conduct of the ICC trials, nor does their length in the Court’s practice thus far give reason to ignore them or downgrade their importance. It is indeed relevant for the assessment of the length of the trial-preparatory proceedings that in Lubanga the various procedural steps were suspended on several occasions. 439 But it is telling that the actual period between the

435 See Chapter 7, section 2.3. While Art. 61(11) refers to the ‘constitution’ of the Trial Chamber, the term ‘assignment of a case’ to the Trial Chamber is used in Art. 64(3) ICC Statute. This inconsistency results from the failure to reconsider either provision and to opt for one concept, as was intended: see G. Bitti, ‘Article 64’, in Triffterer (ed.), Commentary on the Rome Statute 1204, referring to Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/1/WGPM/L.2/Add.2, 24 June 1998.

436 H. Friman, ‘Investigation and Prosecution’, in R. Lee et al. (eds), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Ardsley: Transnational, 2001) 531 (‘The closure of the pre-trial stage does not, however, mean that the case is by then completely prepared for trial.’); R. Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings before it and its Exercise in the Trial of Thomas Lubanga Dyilo’, in C. Stahn and G. Sluiter (eds), The Emerging Practice of the International Criminal Court (Leiden/Boston: Brill, 2008) 501. Cf. Bitti, ‘Article 64’ (n 435), at 1205 (‘Indeed, it is expected that the case will be ready for trial when the Pre-Trial Chamber will confirm the charges. In particular, issues relating to disclosure and relevance or admissibility of evidence should be solved at the pre-trial stage, thus avoiding the start of trial being delayed by litigation on these questions’).

437 Ibid. (indicating that ‘most delegations at the Rome Conference’ in the Statute had the intention of providing effective rules for the preparations of the case before the commencement of the trial and, thus, possibly reduce the time needed for the trial itself’).

438 Decision on the consequences of non-disclosure of exculpatory materials covered by Art. 54(3)(e) agreements and the application to stay the prosecution of the accused…, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1401, TC I, ICC, 13 July 2008 (‘Lubanga confidentiality agreements trial decision’). The stay of proceedings was removed in late 2008 as the reasons for imposing it had fallen away: see, in the same case, Transcript, ICC-01/04-01/06-T-98-ENG, 18 November 2008, at 3. The Lubanga disclosure quandary has been subject to extensive commentary, see e.g. H. Verrijn Stuart, ‘The ICC in Trouble’, (2008) 6(3) JICJ 409; K. Ambos, ‘Confidential Investigations (Art. 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law’, (2009) 12(4) New Criminal Law Review 543.

439 Prior to the mentioned 4-month delay in view of the disclosure problem before the commencement of the trial, the preparatory activities in the case before the Trial Chamber were paused by the Presidency which, upon the accused’s request, suspended the transmission of the record to the Trial Chamber due to the need to appoint a new defence counsel: Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v Thomas Lubanga Dyilo, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-842, Presidency, ICC, 6 March 2007 (‘Lubanga referral decision’). In three months, the record was eventually transmitted: see, in the same case, Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v Thomas Lubanga Dyilo to Trial Chamber I, ICC-01/04-01/06-920, 5 June 2007 (‘Lubanga transmittal of record decision’). Afterwards, the proceedings suffered another setback before the defence case in the second half of 2009 due to the suspension for over two months pending the Appeals Chamber’s decision regarding legal recharacterization of facts under Regulation 55. Given that the delay occurred during the adjournment of trial, it
delegation of the Lubanga case to Trial Chamber I and the commencement of the trial in that case spanned about two years.\footnote{TC I was constituted and the case was referred to it on 3 March 2007 (Lubanga referral decision (n 439)), whilst the trial commenced only on 26 January 2009.} By comparison, the analogous period in the joint Katanga and Ngudjolo Chui case constituted thirteen months.\footnote{TC II to which the Katanga and Ngudjolo Chui case was assigned was constituted on 24 October 2008, and the trial commenced on 24 November 2009. See Decision constituting TC II and referring to it the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Prosecutor v. Katanga and Ngudjolo, Situation in the DRC, ICC-01/04-01/07-729, Presidency, ICC, 24 October 2008.} Partly because of the admissibility challenge brought by the defence, in the Bemba case the relevant interval was fourteen months.\footnote{TC III was constituted on 18 September 2009, but the trial commenced on 22 November 2010. See Decision constituting Trial Chamber III and referring to it the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-534, Presidency, ICC, 18 September 2009.} It can be expected that in the future cases, the average length of the trial-preparation stage will decrease, because the accumulated experience will obviate the need for the Court to ‘reinvent the wheel’ in every case as far as the applicable procedure is concerned. However, at present the preparatory measures require significant periods of time for the Court to complete and, irrespective of the quantum of experience, no case is insured against delays in view of the possible problems with effecting disclosure or the examination of the jurisdiction and admissibility challenges.

Like with the modalities of trial procedure, the regulation of which in the Statute—along with other areas—is earmarked by ‘constructive ambiguity’ beyond what are only most general principles,\footnote{H.J. Brady, ‘Setting the Record Straight: A Short Note on Disclosure and “the Record of the Proceedings”’, in Fischer et al. (eds), International and National Prosecution 261; C. Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’, (2003) 1 JICJ 603, at 605-6. See further Chapter 10.} the pre-trial preparation is subject to fairly limited guidance in the ICC Statute and the Rules and to a large extent left to the discretion of the Trial Chamber. Given scarce regulation, the ICC Trial Chambers arguably possess a broader discretion in shaping the pre-trial process before them than Trial Chambers or pre-trial/designated judges at the ICTY, ICTR, and SCSL.\footnote{Einarsdóttir, ‘Comparing the Rules’ (n 53), at 20.} For the purpose of a clearer exposition of the conduct of the pre-trial proceedings taking place before the Trial Chamber prior to opening statements and evidence-taking, it is warranted to distinguish two major blocks within those proceedings, as set out previously.\footnote{Chapter 7.} Namely, the preparatory phase of the trial proceedings before the ICC Trial Chamber comprises the intervals such as: (i) the ‘proceedings leading up to trial’, as a term that is not part of the Statute’s glossary but used in the ICC first jurisprudence;\footnote{Order setting out schedule for submissions and hearings regarding the subjects that require early determination, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-947, TC I, ICC, 5 September 2007, at 2; Decision on Victims’ Participation, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1119, TC I, ICC, 18 January 2008 (‘Lubanga victim participation trial decision’), passim.} and (ii) the ‘commencement of trial’.\footnote{Art. 64(3)(c) and (8)(a) ICC Statute.} This chronological division is instructive as it points to the different rationales underlying the two phases and varying functions of the Chamber. This section relies on this distinction when providing an overview of the ICC procedures for trial preparation.

can be added to the general length of trial preparation: see Decision adjourning the evidence in the case and consideration of Regulation 55, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2143, TC I, ICC, 2 October 2009, para. 23 (postponing the date for the recommencement of the trial on 6 October 2009 and adjourning the evidence in the case to await the decision of the Appeals Chamber) and, in the same case, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, ICC-01/04-01/06-2205, 8 December 2009.
During the procedural interval (i), or using the Statute’s formula, ‘[u]pon assignment of a case for trial’, the Trial Chamber 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(s) to be used at trial; and (c) provide for disclosure, subject to the relevant provisions. Moreover, as a general matter, the Trial Chamber may exercise any function of the Pre-Trial Chamber that is relevant to the trial proceedings. Additionally, the Trial Chamber may, both during and prior to the trial, (a) require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States; (b) provide for the protection of confidential information; (c) order the production of evidence in addition to that already collected; (d) provide for the protection of the accused, witnesses and victims; and (e) rule on any other relevant matters. This is not an exhaustive list of functions and powers to be exercised by the Trial Chamber with a view to trial preparation, given the general nature of the standards codified in the ICC legal framework and the impossibility of foresee every eventuality that may arise when making the case trial-ready. The general authority of the Trial Chamber to ‘ensure that a trial is fair and expeditious and is conducted with a full respect for the rights of the accused and due regard for the protection of victims and witnesses’ serves as a reservoir of derivative competences that may be invoked in order to expedite preparatory and trial proceedings.

The second mini-phase (‘commencement of trial’) temporally falls within the formal notion of trial as provided for in the ICC legal framework stricto sensu. But the consideration thereof in the present context is justified in view of the preliminary character of the ‘commencement of trial’ proceedings. The functions exercised by the Trial Chamber at this stage—the reading of the confirmed charges to the accused, satisfying itself that he or she understands them and affording the accused an opportunity to make an admission of guilt—invite a parallel with the initial appearance before courts based upon the ICTY procedural model.

The procedures for trial and those for trial preparation are interrelated. The pre-trial measures taken by the Trial Chamber inform the modalities of the conduct of trial and are in themselves shaped by the format of trial. Before discussing specific measures of trial preparation, it is appropriate to address the implications of this link in the context of the ICC trial process. As noted, the trial format and structure at the ICC is subject to limited regulation in Article 64(8) of the Statute and in Rule 140. The reason for that is the impossibility for the delegations to the Rome Conference and to the Preparatory Commission, which represented the common-law and civil-law approaches to organizing the process, to reach consensus on any more concrete provisions during the negotiations of the Statute and the Rules. Beyond general provisions in Rules 140(2) and (3) and 141, it is the Presiding Judge of the Chamber who will give directions for the conduct of the proceedings and testimony; lacking those directions, the parties are to agree amongst themselves on the order and manner of submitting evidence; in case of disagreement, the Presiding Judge shall issue the directions. Thus, in contrast to the legal frameworks of all other historical and contemporary international and internationalized criminal courts, the ICC law does not contain any preset sequence and modalities of the trials and is beset by uncertainty in this regard.

The attempts to describe the architecture of the ICC trials traditionally by using the adversarial v. inquisitorial positioning; in this sense, it has been submitted that they are sui
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generis. This is fundamentally true, in the sense that from the comparative perspective, the ICC system is unique. However, this does not explain much, because the same could be noted with respect to the trial proceedings before any other international criminal tribunal. To varying degrees, their trial procedures merge elements drawn from the adversarial and inquisitorial models in a manner that ensures the hybrid and qualitatively new character of the resulting model. Innovative features of the ICC procedural regime, for example, victim participation, automatically render the ICC trials sui generis. The label sui generis in itself says little about the nature of the ICC trial proceedings: it can be misleading in the sense that it does not refer to a certain ‘nature’ of trials corresponding to a core set of constant characteristics of format and layout. When seen through the inquisitorial v. adversarial lenses, the ICC is neither fish nor foul: its trial process is shrouded in indeterminacy.

Since the details of the ICC trial regime have been left to the judicial determinations limited only by broad-brush architecture set out in Rule 140, emphasis on the broad discretion of the Chamber in devising the trial proceedings is key to describing ICC trials.456 If the conception of ‘ICC trials’ as a distinct model is justified at all, the broad discretion entails that there is no single design and arrangements may fluctuate from one case to another.457 Because trial procedures are subject to judicial directions or agreements inter partes in each case, the ICC trials may potentially have as many ‘faces’ as there are cases. As a matter of law, nothing precludes the Trial Chambers from departing from the trial procedures adopted in the earlier cases. Possible harmonization of the trial procedures over the time may result from extralegal factors such as the considerations of efficiency, which militate against the need to ‘reinvent the wheel’, the experiences gained in the previous trials, and the effects of institutional memory. The amorphous regulation of the trial process makes it appropriate to speak of the ICC trial procedure being ad hoc. This institutional feature is unique in the dimension of the international criminal justice system. Although the Trial Chambers in other courts are invariably vested with discretion to amend the pre-established order of case presentation and sequence and modalities of questioning witnesses,458 they would normally at least be able to lean against the trial format set out explicitly in the Rules and, as the experience of the ICTY, ICTR, and SCSL proceedings shows, take those as granted.459 But the major drawbacks of the ICC regime in this regard are uncertainty and unpredictability.460

455 Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 605 (arguing that ‘there actually is no other point of reference outside the law of the ICC. The ICC negotiators neither copied any of the so-called mixed adversarial-inquisitorial systems …, nor did they choose to follow the hybrid process that has evolved over time before the ICTY and the ICTR. Taken as a whole, the procedural law of the ICC is thus, not only new but also truly unique.’).
456 Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 613 (noting that ‘the Presiding Judge has been entrusted with a wide margin of discretion with regard to the conduct of the proceedings’); Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 501; McLaughlin, ‘The Sui Generis Trial Proceedings of the ICC’ (n 454), at 345.
457 McLaughlin, ‘The Sui Generis Trial Proceedings of the ICC’ (n 454), at 345 (noting that ‘a significant part of the trial proceedings will ultimately be determined by the judges on a case-by-case basis, exercising their discretion within the framework of the Statute and the Rules.’).
458 Rule 85(A) ICTY, ICTR, and SCSL RPE and Rule 146(B) STL RPE: ‘Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence’ (emphasis added).
459 Exceptionally, STL Rule 145 embodies the discretion of the STL Trial Chamber to opt between two major—inquisitorial and adversarial—modes of questioning of witnesses, i.e. to decide whether to question each witness first or to concede the right to start the examination to the calling party. However, this decision is subject to the Chamber’s determination of whether the Pre-Trial Judge’s file enables it to adopt the inquisitorial mode of proceeding with the trial.
460 H. Friman et al., ‘Measures Available to the International Criminal Court to Reduce the Length of Proceedings’, Informal Expert Paper, ICC Office of the Prosecutor, 2003 (‘ICC-OTP Informal Expert Paper’), para. 87 (‘By entrusting the trial procedures to the presiding judge, there is a risk that the trial will be shaped in fundamentally different ways in different cases. While this to an extent may be motivated by different
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As for the link between the trial format trial-preparatory measures, the amorphousness of the ICC trial procedure has consequences for the pre-trial activities of the Trial Chamber, as it informs its powers and the way of exercising them with view to streamlining the conduct of the trial. It has been observed that the uncertainty of the ICC trial regime spills over to the earlier stages such as investigation and the trial preparation. In order to be able to effectuate the projected configuration of the trial format, for instance with respect to the sequence and modes of eliciting evidence, and therewith its discretion in devising the trial proceedings, the Trial Chamber must be equipped with a broad inventory of powers in preparing the case for trial. Should it decide to adopt the inquisitorial-like style for the submission of evidence at trial, i.e. to have evidence presented in the form of a single case structured per topics, rather than in two cases presented by the parties, and to have a leading role in the examination of witnesses, it must be have had advanced access to the parties’ proposed evidence.

Finally, a clarification is in order regarding the approach of the following paragraphs. The trial preparation stage at the ICC comprises a host of activities by the Trial Chamber and the parties and participants. This includes decisions on a wide range of issues that are to be made at this stage, including the presence of the accused, disclosure, motions challenging admissibility and jurisdiction, joinder and severance, etc. Despite their importance, these issues will not be subject to detailed consideration in this Chapter, in keeping with the focus on chronology and structure of trial proceedings. The same holds for provisions relating to the trial-preparatory activities governed by ‘general precepts for the holding of the trial’ of essentially organisational nature. Thus, the trial-preparatory proceedings at the ICC are approached from the perspective of its organisational forms and modalities; the substantive matters tackled by the court during this phase are discussed tangentially.

3.3.2 Proceedings leading up to trial

A. Status conferences

Like in other courts, the considerable portion of pre-trial work at the ICC is executed in writing, through motions and filings, including the delivery of materials to the Chamber, and the Chamber’s decisions thereon. Status conferences are an essential and, in fact, the only existing live—as opposed to written—form of organizing trial preparation. By holding circumstances, for example the degree of defence involvement at the investigation stage, exercise of very extensive discretion in deciding the trial procedures to be followed in the particular case will lead to uncertainty.’; S. Kirsch, ‘The Trial Proceedings before the ICC’, (2006) 6 International Criminal Law Review 275, at 275 (noting the unforeseeable character of ICC trials); Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 613 (a wide margin of discretion of the Presiding Judge with regard to the conduct of the proceedings opportunities and risks, the former being flexibility to tailor procedures to the needs of individual case and the latter the lack of guidance).

ICC-OTP Informal Expert Paper (n 460), para. 87.

Art. 63 ICC Statute

Arts 64 (3)(c) and 67(2) ICC Statute and Rules 76-77, 81-84, 78-79 ICC RPE.

Rule 133 ICC RPE.

Art. 64(5) of the Statute; Rule 136 ICC RPE.

See Chapter 1.


Notably, Regulation 30 of the Regulations of the Court provides that status conferences may be held not only by way of hearings, including via audio- or video-link technology, but also through written submissions.
these meetings between the Trial Chamber, parties and participants, the Chamber implements Article 64(3)(a) of the Statute, which mandates the Chamber to confer with the parties and adopt such procedures as necessary to facilitate the fair and expeditious conduct of the proceedings.\(^\text{469}\) The ICC Statute contains no standards highlighting the purpose of holding such conferences, but the Rules and Regulations of the Court provide the necessary guidance in this respect. ICC Rule 131(1) stipulates that the Trial Chamber shall hold a status conference in order to set the date for trial, promptly after it is constituted.\(^\text{470}\) This sub-Rule refers to the first mandatory conference before the Chamber.\(^\text{471}\) Furthermore, Rule 132(2) provides that the Trial Chamber may confer with the parties by holding further status conference, with view to ensuring fair and expeditious conduct of the proceedings.\(^\text{472}\)

No specific time limit for holding the first status conference could be agreed on by the Preparatory Commission. Hence the determination of what ‘promptly’ in Rule 131(1) means was left to the judges and eventually depends on the individual circumstances of the case.\(^\text{473}\) For example, the first hearing of the Lubanga case held in the Trial Chamber, the transcripts of which are made publicly available, took place on 4 September 2007, i.e. six months after the constitution of the Chamber and three months after the transmission of the record.\(^\text{474}\) But the first status conference was held even later, on 1 October 2007.\(^\text{475}\) This can hardly be deemed as ‘prompt’ even under the liberal interpretation of Rule 132, which refers to the constitution of the Trial Chamber rather than the transmittal of the record as the point of departure for convening the first status conference.\(^\text{476}\)

The more recently adopted Rule 132bis authorizes the Trial Chamber to designate one or more of its members ‘for the purposes of ensuring the preparation of the trial’.\(^\text{477}\) This innovation clearly draws upon the ICTY experience of using pre-trial judges and aims at intensifying the Trial Chamber’s involvement in case-management while saving judicial resources.\(^\text{478}\) The ICC single judge is responsible for ‘all necessary preparatory measures in order to facilitate the fair and expeditious conduct of the trial proceedings, in consultation with the Trial Chamber’.\(^\text{479}\) These responsibilities are carried out, among others, by holding status conferences, rendering orders and decisions, and establishing ‘a work plan indicating the obligations the parties are required to meet ... and the dates by which these obligations


\(^{470}\) Rule 132(1) ICC RPE. The same sub-Rule also stipulates that the Trial Chamber may postpone the date of the trial, on its own motion or at the request of the Prosecutor or the Defence. It shall also notify all those participating in the proceedings of the trial date and ensure that the date and any postponements are made public. The latter provision indeed appears superfluous, cf. Lewis, ‘Trial Procedure’ (n 452), at 542.

\(^{471}\) Bitti, ‘Article 64’ (n 435), at 1206, noting the distinction between the first and further status conferences.

\(^{472}\) Rule 132(2) ICC RPE.

\(^{473}\) Lewis, ‘Trial Procedure’ (n 452), at 542. In Katanga and Ngudjolo, the first status conference was held in one month after the constitution of TC II: see Transcript, Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-T-52-ENG, TC II, ICC, 27 November 2008. The respective interval in Bemba Gombo was over 2 months from the constitution of TC III (18 September 2009): see Transcript, Prosecutor v. Bemba Gombo, Situation in the CAR, ICC-01/05-01/08-T-18-Red-ENG, TC III, ICC, 8 December 2009.

\(^{474}\) Lubanga referral decision (n 439); Lubanga transmittal of record decision, ibid.; Transcript, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-T-50, TC I, ICC, 4 September 2007.


\(^{476}\) Decision transmitting the pre-trial record of proceedings in the case of The Prosecutor v Thomas Lubanga Dyilo to Trial Chamber I, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-920, Presidency, ICC, 5 June 2007.

\(^{477}\) Rule 132bis(1) ICC RPE. The rule was introduced by Resolution ICC-ASP/11/Res.2, Amendment of the Rules of Procedure and Evidence, adopted at the 8th plenary meeting, ASP, 21 November 2012.

\(^{478}\) On pre-trial judges in the ICTY, see Chapter 6.

\(^{479}\) Rule 132bis(2) ICC RPE.
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must be fulfilled.’ 480 Rule 132bis(5) provides a non-exhaustive list of preparatory issues with respect to which the single judge may exercise his or her functions, including disclosure between the parties, protective measures, victims’ applications for participation, conferring with the parties regarding matters covered in Regulation 54, scheduling save for fixing the trial date, and so forth. But the powers of the single judge clearly remain subordinate to that of the Trial Chamber which may decide to deal with the relevant matters by itself proprio motu or whenever requested by the judge or by a party. 481 Decisions that may ‘significantly affect the rights of the accused or which touch upon the central legal and factual issues in the case’ as well as decisions affecting the ‘substantive rights of victims’ remain within the exclusive competence of the Chamber. 482 Similarly, the full Chamber is to make decisions on the matters referred to in Regulation 54. 483

Regulation 54 provides an insight into the functions of ICC status conferences as it provides a non-exhaustive list of orders the Trial Chamber may issue at such a conference. The sixteen items on the list can be categorized thematically by their rationale. First, the predominant number of measures listed purport to enhance the Trial Chamber’s knowledge of the projected scope and content of the case to be tried. For example, it has the power to order the parties to submit: (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) of the 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 Article 69(2) or exhibits to be introduced together with their length and size; (h) the issues the participants propose to raise during the trial. 484 Within the same category falls the Chamber’s inherent prerogative to order the parties to indicate what facts they have agreed upon under Rule 69, as well as the power to request to inform it of the defences which the accused intends to rely upon. 485 This set of the ICC Trial Chamber’s powers to order the submission of materials—whose volume goes beyond the record of pre-trial proceedings (Rule 121) and may include evidence disclosed inter partes and additional information about the case—involves a parallel with the ICTY PTJ’s competence to collect pre-trial and pre-defence filings from the parties under Rule 65ter. 486

Secondly, some of the already listed a number of remaining items give rise to the power of the Trial Chamber not merely to order the respective filings from the parties but also to decide on the proposed terms of those filings. It would be pointless for the Chamber to order extensive pre-trial submissions only for the sake of it. First, the Chamber may use its familiarity with the materials delivered by the parties in order to manage the case presentation. Regulation 54 is therefore a tool for the Chamber to streamline and shorten the trial proceedings. 487 The comparative vantage point in this respect is provided by the procedure at the Pre-Trial and Pre-Defence Conferences before the ICTY, ICTR and SCSL whereby the courts may moderate the scope and length of the case to be presented. 488 At the same time, the powers to be exercised by the Chamber based on its knowledge of the case

480 Rule 132bis(4) ICC RPE.
481 Rule 132bis(3) ICC RPE.
482 Rule 132bis(6) ICC RPE.
483 Rule 132bis(3)(d) ICC RPE.
484 E.g. Agenda for Status Conference on 28 May 2008 and scheduling order, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1343, TC I, ICC, 21 May 2008, para. 2 (ordering the prosecution to submit, as per Regulation 54: the number of witnesses and the order in which they will be called; length of the evidence; length of the questioning of the witnesses; length and content of the opening statement(s); time-line for the filing of applications for protective measures; update on languages used by the witnesses).
485 Regulation 54(a)-(h), (n) and (p) Regulations of the Court.
486 See Chapter 6 and supra 3.2.3.B. Rule 65ter(E)-(H) ICTY RPE. Noting the similarity, see Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 505 and 508-9.
487 Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 508.
488 See supra 3.2.
might go beyond ‘managerialism’. As observed earlier, the border between case management and measures for the more effective establishment of the truth is rather porous: the ‘managerial’ measures affect and in turn are informed by the preliminary views of the adjudicator on the scope and object of the factual inquiry. The Chamber’s competence of putting to use the submissions by the parties ordered under Regulation 54 must be placed in the context of its expected role and correspondent powers to be actively involved in the truth-finding process under Articles 64(6) and 69(3) and Rules 69 and 140(2)(c). From the Regulation 54 list, one could infer the Trial Chamber’s power to issue orders: (a) setting the length and (approximate) content of legal arguments and the opening and closing statements; (b) regarding evidence summaries (e.g. finding them insufficiently detailed); (c) setting the length of evidence to be relied on and the length of examination of witnesses; (d) setting the number of witnesses the party is allowed to call; (e) regarding the statements of the witnesses (e.g. finding them inadmissible); (f) setting the number of written evidence to be adduced pursuant to Article 69(2); (g) authorizing or prohibiting the parties to raise certain issues during the trial; (h) determining the extent to which the participants can rely on recorded evidence such as transcripts and the audio- and video-recording of evidence given; (i) ordering the presentation of evidence in summary form (e.g. in case it proceeds under Article 65(4)(a) of the Statute); (j) determining the extent to which evidence may be given by an audio- or video-link. Furthermore, the ICC trial judges are endowed with the authority to order the evidence to be introduced in relation to agreed facts under Rule 69, with a view to ‘a more complete presentation of the alleged facts … in the interests of justice, in particular, the interests of victims’. Thus, the Trial Chambers are equipped with extensive powers enabling them to reduce, ex ante, the volume of the evidence to be presented at trial. The early management of the case can be carried out by way of a prima facie assessment of the relevance and admissibility of evidence prior to the commencement of trial.

The Katanga and Ngudjolo proceedings provide an example of the application of case managerial powers by the judges under Regulation 54. In that case, Trial Chamber II considerably reduced the length of the prosecution case ex ante. During a status conference, it ordered the prosecution to amend its initial proposal by radically reducing the number of hours for examination-in-chief (the estimated 246 to 276 hours). The newly submitted

489 Underlining the link between the power to order party filings and the opportunity for the Chamber to ‘play a meaningful role in establishing the truth’, see Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 505 (‘in order to play a meaningful role in establishing the truth, the Trial Chamber may employ its regulatory power under Article 64 (3) (a) and Rule 134 to require the parties to submit information disclosed to the other party, as well as additional information relevant to the management of the proceedings, to the Chamber, before the commencement of the trial.’).

490 For example, the TC may consider proposed legal arguments unnecessary in view its intention to change the legal characterization of facts under Regulation 55 of the Regulations of the Court or it may limit the length of oral and/or written arguments: Gallmetzer, ibid., at 509.

491 Regulation 54(a)-(k) and (n) ICC Regulations of the Court.

492 Decision on agreements between the parties, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1179, TC I, ICC, 20 February 2008, para. 11 (ordering the parties to prepare a ‘draft schedule of agreed facts to be considered by the Chamber eight weeks before the commencement of the trial’, to enable the Chamber ‘effectively to exercise its case-management powers under Regulation 54(n) of the Regulations of the Court and, in particular, to ensure that witnesses are not needlessly brought to court when their evidence is not in dispute’).

493 Rule 64(9)(b) ICC RPE (‘The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to … [r]ule on the admissibility or relevance of evidence’); Rule 69(3) ICC RPE (‘The parties may submit evidence relevant to the case, in accordance with Art. 64.’ – Emphasis added.) See Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 509-10.

494 Directions for the conduct of the proceedings and testimony in accordance with rule 140, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, ICC-01/04-01/07-1665, TC II, ICC, 20 November 2009 (‘Katanga and Ngudjolo trial directions’), para. 6 and n7 (referring to confidential transcript ICC-01/04-01/07-T-
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proposal provided an estimate of 200 hours for the examination-in-chief of the total of 26 prosecution witnesses.\textsuperscript{495} The Chamber calculated that the prosecution case thus projected was based on the allocation of almost eight hours per witness. Whilst it reassured of its awareness of the ‘structural and technical differences between the Court’s proceedings and those of the \textit{ad hoc} tribunals’, among which the lack of witness proofing in the ICC,\textsuperscript{496} it indicated that 4.5 hours per witness on average will be sufficient, which allows reducing the length of the prosecution’s examination-in-chief to 120 hours.\textsuperscript{497} The Chamber affirmed that the prosecution would autonomously distribute the available time between the witnesses it intended to call.\textsuperscript{498} Lastly, for the purpose of cross-examination, the Chamber allocated each defence team roughly 60 percent of the time used by the prosecution for examination-in-chief.\textsuperscript{499}

The third category of competences the Trial Chamber may exercise at the status conferences encompasses miscellaneous but no less important matters, such as: (a) disclosure; (b) the joint or separate instruction by the participants of expert witnesses; and (c) the conditions under which the victims shall participate in the proceedings.\textsuperscript{500} As is clear from Regulation 54’s chapeau, this list is not exhaustive. For one thing, the Chamber’s orders for disclosure are not only a tool to manage and streamline the preparation for trial. It is also the way to ensure that the defence will be served the materials that have remained undisclosed in the wake of the confirmation hearing sufficiently in advance of the trial so that the defence is able to adequately prepare for it, as a prerequisite for holding the trial.\textsuperscript{501} For the other thing, the manner in which the victims shall participate in the proceedings pursuant to Article 68(3) as a matter for resolution by the Chamber during or between the status conferences, reaches far beyond the question of trial management. Although the scope of victim participation in the trial is certainly be a major factor affecting the length of the proceedings, it also has an influence on the structure of the trial and the order of examination of witnesses. In general terms, it profoundly affects the very nature of the trial. For instance, if victims are allowed to lead and challenge evidence before the Chamber, through their legal representatives or in person, the trial sequencing will necessarily have to accommodate a separate ‘evidentiary block’ for the victims.

This outline of the activities at a status conference indicates the multifunctional nature of these meetings. On the one hand, certain powers of the Trial Chamber—notably, to rule on disclosure—attest clearly to the possibility of using the conferences for streamlining the trial preparation and reviewing the status of the case, which makes them akin to the ICTY, ICTR and SCSL status conferences.\textsuperscript{502} This parallel is in particular warranted in view of the open-

\textsuperscript{495} Notification de l’Accusation sur la durée des interrogatoires principaux des témoins à charge, \textit{Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC}, ICC-01/04-01/07-1636, OTP, ICC, 13 November 2009, para. 4.
\textsuperscript{497} Katanga and Ngudjolo trial directions (n 494), para. 8.
\textsuperscript{498} \textit{Ibid.}, para. 9.
\textsuperscript{499} \textit{Ibid.}, para. 10.
\textsuperscript{500} Regulation 54(1), (m) and (o) of the Regulations of the Court.
\textsuperscript{501} See e.g. \textit{Lubanga} confidentiality agreements trial decision (n 438).
\textsuperscript{502} \textit{Supra} 3.2.3.A.
ended character of the Regulation 54 list, owing to which the conditions of detention of the accused possibly fall within the subject-matter of the status conferences at the ICC.\textsuperscript{503} On the other hand, the denomination ‘status conferences’ notwithstanding, it is fair to say that the ICC conferences are very similar to the ICTY’s Rule 65\textit{ter} meetings and the \textit{ad hoc} tribunals’ Pre-Trial and Pre-Defence conferences.\textsuperscript{504} The foregoing discussion of the first and second categories of competences of the Trial Chamber shows that the orders to the parties to make pre-trial submissions to the Chamber clarifying the nature, scope and, to a certain degree, the content of their respective cases, are issued in the preparation or as a result of the conferences. In a similar vein, the Chamber may use its acquired knowledge of the evidence proposed by the parties to manage the case presentation in advance, by setting limits on the length of questioning of witnesses, the number of witnesses and ruling on the modalities of submitting the evidence. Whilst the Chamber’s powers to solicit filings and to perform case managerial measures on that basis are not formulated in the way as extensive and specific as, for instance, in ICTY Rules 65\textit{ter}, 73\textit{bis} and 73\textit{ter}, the Trial Chamber is availed of comparable competences. The ICC Rules make no provision for the exercise of delegated functions of facilitating communication between the parties by senior legal officers as is the case with the ICTY Rule 65\textit{ter} meetings, but the use of this avenue is in principle not precluded.\textsuperscript{505} As noted by one commentator, it is of utmost importance that the ICC Trial Chambers fully exercise their managerial powers.\textsuperscript{506}

The multi-functionality of status conferences does not mean, however, that they may be used for the measures that are clearly reserved for other stages. As was noted in the previous Chapter, the early ICC practice provides an example of inapposite use of this forum, for reading the charges to the accused and receiving a plea under Article 65, despite that according to Article 65(8)(a) the accused shall be given an opportunity to admit guilt or to plead not guilty at the commencement of trial only.\textsuperscript{507} Thus, prior to the first status conference, Trial Chamber II in \textit{Katanga and Ngudjolo Chui} informed the accused that the steps set out in Article 64(8)(a) shall be executed at that conference, only to be repeated ‘at the commencement of the hearings on the merits’.\textsuperscript{508} The accused were read the charges and invited to enter a plea, first early in the trial-preparation stage and then at the opening of the trial.\textsuperscript{509} Even though none of the parties objected, this practice departs from the Statute and conflates the functions to be exercised during the first status conference in accordance with Rule 131(1) and at the opening of the trial per Article 64(8)(a). One may see merit in Trial Chamber II’s reasoning that entering of a plea as early as possible is cogent as it would affect

\begin{footnotes}
\footnotetext{503} Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (Art. 64(3)(a) of the Statute), \textit{Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC}, ICC-01/04-01/07-747, TC II, ICC, 13 November 2008 (‘Katanga and Ngudjolo status conference order’), para. 10 (soliciting, \textit{inter alia}, the Defence observations concerning the conditions of detention).
\footnotetext{504} This is noted e.g. in Einarsdóttir, ‘Comparing the Rules’ (n 53), at 19.
\footnotetext{505} ICC-OTP Informal Expert Paper (n 460), para. 53. However, Rule 132\textit{bis} does not explicitly envisage this possibility.
\footnotetext{506} Bitti, ‘Article 64’ (n 435), at 1206. Cf. ICC-OTP Informal Expert Paper (n 460), para. 85, observing that the method of imposing time limits for the presentation of the case by the parties could also be employed by the ICC, but with due regard to the risks of incomplete presentation of the events.
\footnotetext{507} Chapter 7, section 3.1. See also P. Lewis, ‘Confirmation Hearing to Trial’, in Fischer et al. (eds), \textit{International and National Prosecution} 226 n34 (‘the Trial Chamber can only receive an admission of guilt at the commencement of the trial. There is no provision under the Statute or the Rules for an admission of guilt to be entered on an earlier occasion.’).
\footnotetext{508} \textit{Katanga and Ngudjolo status conference order} (n 503), para. 8
\footnotetext{509} Transcript, \textit{Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC}, ICC-01/04-01/07-T-52-ENG, TC II, ICC, 27 November 2008, at 10 (supporting its interpretation of Art. 64(8) (a) by the consideration that the opportunity to plead must be given ‘now at the beginning of our discussion as it would be radically different if one of the accused or both decided to enter a guilty plea’) and 17 \textit{et seq}. See also, in the same case, Transcript, ICC-01/04-01/07-T-80-ENG, 24 November 2009, at 11 \textit{et seq}.}
\end{footnotes}
the further course of the proceedings, including the very need to prepare for trial.\textsuperscript{510} However, after having received an indication that there is going to be no early admission of guilt, the Chamber should proceed with the preparation without the ado of formally receiving a premature plea.\textsuperscript{511} Otherwise, it is hard to explain how the ‘double’ pleading can be reconciled with efficiency, especially in the present case where the defence counsel for both accused had clearly indicated to the Chamber that their clients did not intend to admit guilt at any stage.

It has been observed that the Rules and Regulations governing status conferences are silent as to who may attend them.\textsuperscript{512} Given that Regulation 54 sets forth a list of items that are numerous and diverse, it is safe to assume that, aside from the parties, either together or separately for the purpose of \textit{ex parte} hearings, the invitation to attend a status conference may and, in certain situations, shall be extended to other actors.\textsuperscript{513} In particular, the participation of the legal representatives of the victims appears both logical and indispensable,\textsuperscript{514} whereas on the others it should be possible for the representatives of States to participate.\textsuperscript{515}

\textbf{B. Record of the proceedings}

The matter important in the context of trial preparation before the ICC is the question of the case record, because the judicial role at trial and the format of the trial process to a large extent depend upon who holds the custody of the materials and evidence on the record, what it is composed of, who may access it and under what conditions, and so on. The functions exercised by the judges during trial, i.e. their participation in the questioning of witnesses and giving appropriate direction to truth-finding, depend on the possibility for them to have access to the information contained in the record and additional materials filed by the participants prior to the trial.

As noted, Rule 130 sets the duty of the Presidency to submit the decision confirming the charges along with the record of the proceedings to the Trial Chamber, earlier transmitted to the Presidency by the Pre-Trial Chamber.\textsuperscript{516} It is further provided that the Registrar shall maintain the record transmitted by the Pre-Trial Chamber.\textsuperscript{517} The record at this stage consists of the record of the confirmation hearing, including the evidence submitted to the PTC in the course of that hearing, any evidence disclosed \textit{inter partes}, and a transcript of the proceedings.\textsuperscript{518} That record may be consulted by the prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to Rules 89 to 91, subject, however, to restrictions relating to confidentiality and the protection of national security information.\textsuperscript{519} The Trial Chamber is conspicuously absent from the list of actors who may

\textsuperscript{510} P. Lewis, ‘Confirmation Hearing to Trial’ (n 507), at 225 (noting that before fixing a trial date, the Chamber would need to know whether there indeed is a need to have a trial and, if so, how many).
\textsuperscript{511} \textit{Ibid.}, at 225-6, also speaking of an ‘indication’ (‘Having received an indication on that issue, the Chamber will then be in a position to determine the number of trials.’)
\textsuperscript{512} Bitti, ‘Article 64’ (n 435), at 1206.
\textsuperscript{513} \textit{Ibid.}
\textsuperscript{514} E.g. Regulation 54(o) Regulations of the Court; Regulation 54(a) with Rule 89(1) ICC RPE; Rule 91(3) ICC RPE (the possibility for the legal representatives to question witnesses and experts may entail the need for the Chamber to enquire about the respective intentions in advance); Regulation 54(f), (h), (i) and (m) (referring to ‘participants’ rather than ‘parties’); See \textit{ibid.}
\textsuperscript{515} See Bitti, ‘Article 64’ (n 435), at 1206, observing that the State representatives may be invited to attend the status conferences when the State interests are at stake, for example, regarding issues of jurisdiction and admissibility (Art. 19(4)), protection of state agents (Art. 68(6)) and of the confidential and national security information (Arts 54 (3)(e) and 72).
\textsuperscript{516} Rule 129 ICC RPE.
\textsuperscript{517} Rule 131(1) ICC RPE.
\textsuperscript{518} Lewis, ‘Trial Procedure’ (n 452), at 540.
\textsuperscript{519} Rule 131(2) ICC RPE.
access and consult the case record. As reported by the negotiators of the Statute and Rules, this issue generated a highly contentious and complicated debate—more than with respect to the access to the record by the Pre-Trial Chamber—and it divided the delegations visibly along the common law v. civil law line.

Predictably, the representatives of civil law jurisdictions maintained that the Trial Chamber must be accorded with a prerogative of unimpeded access, both before and during the trial, to the case record containing the evidence disclosed prior to the confirmation hearing and updated with the materials disclosed prior to trial (a dossier approach). This conforms with the absence of a strong distinction between the pre-trial and trial phases and the notion of unity of evidence generated throughout the proceedings for the purpose of the decision, which are characteristic for the civil-law trial theory. The full access to the record would enable the Chamber to effectively exercise its powers of ordering disclosure of evidence and additional materials (Articles 64(3)(c) and (6)(d) of the Statute), as well as to meaningfully participate in the fact-finding inquiry by conducting the questioning of witnesses and ordering the submission of further evidence (Article 69(3) of the Statute). Common law delegations, on the other hand, maintained the position that the trial rather than the confirmation hearing must be the focal point and centerpiece of the proceedings, where the evidence is presented and evaluated. So the record of the proceedings would not even very remotely resemble the civil-law dossier. According to that view, the Trial Chamber’s familiarity with the case materials prior to the moment they become evidence proper, i.e. when it has been presented and examined in court, would compromise its adjudicative impartiality. Consequently, the common law negotiators argued that the material disclosed prior to the trial should not be added to the record and that trial judges may not be granted full access to that record, save for the portions inspecting which is necessary for the purpose of issuing orders for disclosure, production of additional evidence, suppression of certain parts of record, and protective measures.

The strong difference in opinions precluded the Preparatory Commission from arriving at a clear and specific rule regarding the Chamber’s access to the record and the terms for updating it with materials disclosed in the pre-trial. The compromise reflected in Rule 131(2) is as much as could be achieved. This Rule is open to opposing interpretations: from a civil-law perspective, the power of the Trial Chamber to inspect the record is most logical and can be implied, whereas common-law lawyers would refer to the deliberate character of the

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521 Lewis, ‘Trial Procedure’ (n 452), at 540; Brady, ‘Setting the Record Straight’ (n 443), at 269 and 272; G. Bitti, ‘Two Bones of Contention Between Civil and Common Law: The Record of the Proceedings and the Treatment of a Concursus Delictorum’, in Fischer et al. (eds), International and National Prosecution 277-9 (who describes the contention between the common law and civil law by no other word than ‘fight’: ibid., at 273-5); Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 612; ICC-OTP Informal Expert Paper (n 460), para. 67.
522 Lewis, ‘Trial Procedure’ (n 452), at 540 (‘For many delegations (particularly those with civil law traditions), the pre-trial proceedings are an integral part of the whole trial process, and the record of those proceedings is an important source of information for the Trial Chamber.’)
523 Brady, ‘Setting the Record Straight’ (n 443), at 269-70; Bitti, ‘Article 64’ (n 435), at 1205: ‘It will be essential for the Trial Chamber to consult the record of the proceedings in order to have the sufficient knowledge of the case to fully control the proceedings: it may be a question of survival for the [ICC] to follow the evolution of both ad hoc Tribunals where the Judges have increased their control over the proceedings in order to shorten the trials … [and] absolutely vital for the Court not to leave the trial in the hands of the parties to avoid lengthy trials which affect the credibility of international justice.’; ICC-OTP Informal Expert Paper (n 460), para. 69.
524 Brady, ‘Setting the Record Straight’ (n 443), at 270.
525 Ibid.; ICC-OTP Informal Expert Paper (n 460), para. 68 (‘The main argument in favour of the Trial Chamber not seeing disclosed material before it hears a case is that, as arbiter of the facts whose decision must be based squarely on evidence admitted at trial, the court should be as ‘untainted’ as possible.’)
526 Ibid.
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omission of the reference to the Trial Chamber in the list of actors with the right to access.\textsuperscript{527} As in other areas of insurmountable disagreement, deciphering the ‘constructing ambiguity’ of the statutory provisions and rules was left to the judges.\textsuperscript{528} There are good arguments to defend either position. On the one hand, the Trial Chamber needs to be equipped for the active search of the truth and for rendering a reasoned decision.\textsuperscript{529} On the other hand, the judges ought to come to the trial with untainted minds.\textsuperscript{530} Eventually, the answer depends on the Trial Chamber adopts a ‘hands on’ or a ‘hands off’ approach to examining the evidence and on what role it assumes in truth-finding.\textsuperscript{531} According to one sceptical view, judges tend to act in the way they are used to, which depend on their background.\textsuperscript{532} Somewhat differently, a recommendation was made for the Court to refrain from resorting to the ‘dossier approach’ in the early stages of its activities and to consider using this option only in case other available measures to shorten the proceedings prove insufficient.\textsuperscript{533}

The issues of the record of the ICC trial proceedings and custody of evidence at trial proved to be less contested. This is reflected in the straightforward Article 64(10) and Rules 137 and 138. The former provision prescribes the Trial Chamber to ensure that a compete record of the trial that accurately reflects the proceedings is made and that it is maintained and preserved by the Registrar. Rule 137(1) reiterates the duty of the Registrar to compile and preserve a full and accurate record of all proceedings, which at the trial stage includes ‘transcripts, audio and video recordings and other means of capturing sound or image’. The requirements of completeness and accuracy are self-explanatory: neither reasoned trial judgment nor effective appeal review are possible in the absence of such trial record.\textsuperscript{534} In case the hearing is held in a closed session, for instance when the requests for protective measures for victims and witnesses are considered, the trial record will remain undisclosed to

\textsuperscript{527} Lewis, ‘Trial Procedure’ (n 452), at 540 (‘For many civil law delegates, it was implicit that the Trial Chamber could inspect the records of another Chamber of the Court. Equally, for many common law delegates, the omission of any reference to the Trial Chamber was a clear indication that the record was not available to the Trial Chamber and was merely a historical record available to the parties.’). Cf. Bitti, ‘Two Bones of Contention’ (n 521), at 278 (‘For civil law countries it was obvious that a Judge shall consult the Record of the proceedings of he or she wants to conduct the trial so it was not even necessary to mention it.’) and 279 (‘nobody and nothing is going to prevent a Judge to have access to the Record if he or she wants to do so.’).

\textsuperscript{528} Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 612.

\textsuperscript{529} Brady, ‘Setting the Record Straight’ (n 443), at 271 (‘It may be argued that to effectively use [powers under Arts 64(3)(c) and (6)(d)], the Trial Chamber must have a thorough understanding of a case. … In addition, if the Trial Chamber may access evidence disclosed prior to, or submitted during, the confirmation proceedings, why should it not have access to the rest?’); Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 612-3.

\textsuperscript{530} Brady, ‘Setting the Record Straight’ (n 443), at 271 (‘as arbiter of the fact whose decision must be based squarely on evidence admitted at trial, it should be as ‘untainted’ as possible. … In addition, given that the Defence is not precluded from presenting defences or evidence at trial even though [it] has not complied with disclosure provisions in Rule 79, there is a risk that the Trial Chamber would only ever have access to, and be able to inspect, at best a “one-sided dossier”. This should be avoided.’) Cf. Bitti, ‘Two Bones of Contention’ (n 521), at 279 (‘This has nothing to do with impartiality: it is a problem of the common law tradition and the role of the Judge and nothing else. … [T]he position of my common law colleagues will not work in practice: as far as everybody … will have access to this Record, they will refer to it in their motions and there will be no other possibility for the Trial Chamber but to consult the Record in order to decide on those motions; there is little sense to say that they can have access to that but not to this and besides: who is going to control that?’).

\textsuperscript{531} Bitti, ‘Two Bones of Contention’ (n 521), at 278 (‘If the presiding judge is going to be the one to question the witnesses and to conduct the trial, it is a sheer necessity for him or her to consult the Record of the proceedings, otherwise it will simply be impossible to conduct the trial. But if the Judge is only here to watch the fight between the Prosecutor and the Defence, then there is no necessity for him or her to consult the Record, even if it could be useful to understand more easily what’s going on.’); Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 604.

\textsuperscript{532} Bitti, ‘Two Bones of Contention’ (n 521), at 279.

\textsuperscript{533} ICC-OTP Informal Expert Paper (n 505), para. 70.

\textsuperscript{534} Terrier, ‘Procedure before the Trial Chamber’ (n 467), at 1285.
the public. The disclosure of all or part of the record of closed proceedings may be ordered by the Trial Chamber when the reasons to retain confidentiality are no longer in place. More controversially, the Chamber may authorize persons, other than the Registrar, to take photographs, audio and video recordings. Reportedly, the provision was intended to deal with the likely scenario in which the trial proceedings would arouse substantial public attention; the requirement of the judicial authorization of recording met the concern that capturing of the sound or image of the trial by the mass media or educational film makers might prejudice the interests of the accused or undermine the dignity of the Court. As for material evidence tendered in the course of trial, including documents and exhibits, the Registrar is endowed with the task of retaining and preserving it; the aspects of custody of evidence by the Registry is subject to the Trial Chamber’s orders.

C. Devising the proceedings and consultation with the parties

Devising trial proceedings by means of issuing directions for the conduct of trial pursuant to Article 64(8)(b) of the ICC Statute is the fundamental decision (or rather, a set of decisions) to be made by the Presiding Judge of the Trial Chamber in the preparation for the trial. The issuance of judicial practice directions is the preferred and in fact the only realistic way of making up for the lack of precision in the regulation of the trial in the ICC Statute and Rules. In the absence of such directions, there is, firstly, a risk that an excessive amount of time will be consumed at trial for the resolution of matters of procedural and organisational rather than substantive nature. Secondly, the continuous uncertainty as regards the applicable procedure entails that the parties will not only remain disoriented as to the expected way of proceeding, but also that it would spill over to the pre-trial phase and obscure the conduct of investigations, thereby impairing the parties in the preparation of their cases. Aside from the self-evident—and superfluous—stipulation that the discretion of establishing the procedure be exercised within the boundaries of the Statute and the Rules, the decision under Article 64(8) is informed by a host of factors relevant to the case. The general requirement towards the procedure devised by the Chamber is that it must ‘ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused

535 Lewis, ‘Trial Procedure’ (n 452), at 541, referring to Rule 87(1) which prescribes for such hearings to be held in camera.
536 Rule 137(2) ICC RPE.
537 Rule 137(3) ICC RPE.
538 Lewis, ‘Trial Procedure’ (n 452), at 541.
539 Rule 138 ICC RPE. See also Lewis, ‘Trial Procedure’ (n 452), at 541.
540 ICC-OTP Informal Expert Paper (n 460), para. 86 (referring to decisions taken under Art. 64 (8) (b) and Rule 140 as a policy one). Art. 64 is the only instance in the Statute where such special prerogatives are given to a presiding member of the Chamber (cf. Art. 57 in relation to the powers of the Presiding Judge of the PTC). However, the Rules embody an approach that is less hierarchical and favour the judicial collegiality (e.g. Rule 134(1) refers to the Trial Chamber rather than the Presiding Judge). See Schabas, A Commentary on the Rome Statute 770. However, Regulation 43 of the Regulations of the Court appears to qualify the Statute’s distinctive role of the Presiding Judge by emphasizing the need for consultation with the other members of the bench: ‘Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning of witnesses and presenting evidence’.
541 ICC-OTP Informal Expert Paper (n 460), para. 94.
542 Ibid., paras 92 (‘it appears important that both the prosecution and the defence know how the trial will be conducted, maybe with different options, before they enter into investigations and set their respective strategies as to how to proceed with a case’) and 94 (‘the lack of a practice direction and a “case-by-case” approach may result in confusion and parties’ uncertainty in preparation [of] cases… For the prosecutor the problems of uncertainty will begin already when collecting evidence during the investigation.’).
543 Art. 64(1) ICC Statute (‘The functions and powers of the Trial Chamber set out in this Art. shall be exercised in accordance with the Statute and the Rules of Procedure and Evidence.’). See Schabas, A Commentary on the Rome Statute 763 (considering it ‘a totally unnecessary provision’).
and due regard for the protection of victims and witnesses.\footnote{Art. 64 (2) ICC Statute.} The provision is inconclusive as to whether the civil law or the common law inclination of the trial is normatively desirable.\footnote{Cf. Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 547 (‘a Trial Chamber should not aim to adopt a procedure that is common-law adversarial or Romano-Germanic inquisitorial, but should aim to devise the procedure that best assists it in ensuring that a trial is fair and expeditious’).} Regulation 43 further obligates the Presiding Judge, in consultation with fellow judges, in determining the mode and order of questioning witnesses and presenting evidence to be guided by the need to: (a) make those fair and effective tool for the determination of the truth; (b) avoid delays and ensure the effective use of time. Despite the differences between the common law and civil law systems regarding the interpretation of the truth in criminal process and the preferred ways of achieving it,\footnote{Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 443), at 613 (recommendating that the ICC trial proceedings should follow the traditional common-law two-case structure in case of non-coordinated investigation, while accepting it might be different when the Prosecutor investigated upon requests of the Defence); ICC-OTP Informal Expert Paper (n 460), para. 95 (‘the degree of defence involvement at the investigative stage may differ and so that might have repercussions as to how the trial is conducted most expeditiously’).} said objective is shared by all modern national criminal justice. Thus, the Regulation cannot be deemed to force the Trial Chamber to take sides in the common law v. civil law divide when developing the trial proceedings.

The considerations that inform the choice of the trial model include the manner in which the investigation has been conducted, in particular whether the parties investigated separately or in coordination.\footnote{Art. 64(3)(a) ICC Statute.} Undoubtedly, more subjective and occasional parameters such as the background and preferences of judges and parties will also be at play. In order for the model opted for under Article 64(8)(b) not to be arbitrary and divorced from the objective and perceived demands of the case, the Statute prescribes (rather than suggests) that the Trial Chamber engage in a consultative process with the parties with a view to determining the way of proceeding at trial in the very early stages of preparation. The use of the word ‘shall’ as opposed to ‘may’ in Article 64(3) attests that it is a statutory duty rather than a privilege of the Trial Chamber, upon assignment of a case for trial, to ‘confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings’.\footnote{Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 502.} This provision makes clear that it is the right of the parties to be heard on the matters related to the conduct of trial.\footnote{See e.g. Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matter, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-T, TC I, ICTY, 24 April 2006.} Rule 134(1) further details the rights of parties and powers of the Chamber related to the consultation prior to the commencement of the trial: the Trial Chamber may \textit{proprio motu} or at the written request of either party rule on any issue concerning the conduct of the proceedings and, unless it is a \textit{ex parte} request, it shall be served on the other party and trigger the right to respond.

The approach which envisages the consultation with the parties on establishing the procedure to be followed is not unique to the ICC. Before the \textit{ad hoc} tribunals, the parties are not precluded from making proposals on the modalities of presentation of evidence at trial and may be invited to do so by the Chamber.\footnote{F. Terrier, ‘Powers of the Trial Chamber’, in Cassese/Gaeta/Jones (eds), \textit{The Rome Statute} 1268.} However, while the relative certainty of the trial regime in those tribunals rendered such consultation an exceptional rather than mainstream practice, its importance in the ICC ought not to be underestimated. Eventually, it was opined, this process is intended to promote ‘genuine procedural consensus by the judges and parties’ and thus held avoid or reduce procedural disputes that could obstruct the course of the trial.\footnote{F. Terrier, ‘Powers of the Trial Chamber’, in Cassese/Gaeta/Jones (eds), \textit{The Rome Statute} 1268.} In the absence of a sufficiently detailed regulation, the principle of consultation imbues the ICC trial practices and process of developing them with greater legitimacy and transparency.
Furthermore, against the backdrop of the limited guidance in Rule 140(2), the consultation can be expected to enhance the quality (fairness and efficiency) of the proceedings.

The subjects on which the consultation may be held with the parties and directions given are not delimited in the ICC Statute and Rules. They are not confined to the determination of the manner in which evidence is to be submitted to the Chamber and potentially encompass any issue of relevance to the conduct of the proceedings. Some of the matters possibly subject to consultations and directions are indicated in Article 64(3), Rule 140(2), and Regulation 54. This includes, among others, the provision for disclosure of the previously undisclosed documents or information; determination of languages to be used at trial; obtaining assistance from States in securing attendance and testimony of witnesses and production of documents; and protection of confidential information.

The combined reading of Article 64(8)(b) of the Statute and Rule 140(1) of the ICC RPE allows discerning at least three scenarios for developing the trial procedures in the individual cases before the ICC: (a) ‘pro-active’ (after having consulted with the parties, the Presiding Judge may give directions for the conduct of proceedings at the outset, subject to the above-noted requirement of doing so in a fair and impartial manner); (b) ‘consensual’ (if the Presiding Judge does not give directions, the prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber; this provision gives rise to a duty on the both parties to strive to reach an agreement); and (c) ‘ultima ratio’ (if no agreement can be reached by the parties, the Presiding Judge shall issue directions).

The former scenario implies the highest degree of pro-activity on the part of the Presiding Judge and the Chamber. It is likely increasingly to be adopted in future cases, i.e. when ICC will be able to draw lessons from the conduct of previous trials which may reduce the need to have an extensive consultative process with the parties or await their agreement on the procedures to be adopted. Alternatively, the Presiding Judge may wish to give directions from the outset when it is clear from the previous litigation that the procedural agreement between the parties is not forthcoming. The second scenario anticipates circumstances in which it is sensible and efficient for the Presiding Judges to allow the parties an opportunity to agree upon the procedure or, in a slight modification, to issue directions concerning principal matters and to leave the remaining ones to the parties. Realistically, there will always be some room for the ‘consensual approach’, given the mandatory nature of the consultative process under Article 64(3) of the Statute. Micromanagement by the Chamber may be unnecessary, and it may be worth allowing the parties to exercise their autonomy in this regard by agreeing on the optimal way of submitting evidence. It is in exceptional cases that consultations and exchanges of views between the parties will fail to produce any agreement at all. Lastly, under the ‘ultima ratio’ of persisting procedural disagreement between the parties, the Presiding Judge will be obligated to make a decision, which is to

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553 Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 503.
554 Art. 64(3)(c) ICC Statute. Moreover, an ex parte (Prosecutor only) consultation may be held in order to determine whether the evidence in his possession and control is exculpatory as per Art. 67 (2) and thus subject to disclosure ‘as soon as practicable’. See Rule 83 ICC RPE: ‘The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under [Art. 67 (2) of the Statute].’ See Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 504.
555 Art. 64(3)(b) ICC Statute.
556 Art. 64(6)(b) ICC Statute.
557 Art. 64(6)(c) ICC Statute.
558 Art. 64(8)(b) ICC Statute.
559 Rule 140(1) ICC RPE.
560 Rule 140(1) ICC RPE.
561 But see Katanga and Ngudjolo trial directions (n 494); Decision on Directions for the Conduct of the Proceedings, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-1023, TC III, ICC, 19 November 2010.
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exclude the situation of the trial proceeding in limbo as to the contested procedural issues and the parties being deprived of any guidance. In such cases, the judicial intervention will likely be moderate and limited to matters not covered or unresolved by an inter partes agreement.

The early practice in the ICC Trial Chambers reflects the use of all three methods of devising trial proceedings, depending on the approach taken by a specific Chamber and on the topic. Given the breadth of the procedural matters the Chambers had to settle in the ICC first trials, it is unnecessary to go into the substance of those directions at this juncture.\(^{562}\) In the first two cases arising from the Situation in the DRC, the Trial Chambers conducted an extensive consultative process with the parties, requesting submissions on a wide range of procedural issues and rendering decisions, where necessary to clarify the substance of the agreement reached or ruling on the matters contested among the parties. The moulding of the procedural framework in the system as flexible as that of the ICC proved to be an exercise that continued beyond the commencement of the trial, as Rule 134(2) envisages.

Early in the Lubanga proceedings, Trial Chamber I issued an order soliciting the views of the parties and participants on a non-exhaustive list of proposals regarding the subjects that required early determination.\(^{563}\) The same order encouraged the parties to confer with one another and work towards an agreement on the proposals or on their alternatives.\(^{564}\) By way of adjusting the timetable following the defence’s request for suspension motivated by the need to familiarize with the materials,\(^{565}\) the Chamber set the schedule for the parties’ submissions on the items of the list.\(^{566}\) Eventually, the list was expanded by additional items, namely, (i) ‘[t]he manner in which evidence shall be submitted subject to Article 64(8)(b) and Rule 140’;\(^{567}\) (ii) ‘The implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5)’;\(^{568}\) (iii) the issue of common legal representation; (iv) the criteria for granting victims status in accordance with Rule 85; and (v) the place of trial.\(^{569}\) Yet, at the subsequent stages of consultation process, the Trial Chamber identified further subjects that required determination prior to the commencement of the trial.\(^{570}\)

\(^{562}\) See Chapter 10.

\(^{563}\) Request for submissions on subjects that require early determination, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-936, TC I, ICC, 18 July 2007, para. 6. The list included the following items: A. The date of the trial; B. The languages to be used in the proceedings; C. The timing and the manner of disclosure of the evidence the Prosecution seeks to rely on to the other party, any participants and to the chamber and all other disclosure issues; D. An e-court protocol; E. The role of victims in the proceedings in the period leading up to the commencement of the trial (and during the trial, as a separate topic); F. The procedures to be adopted for instructing expert witnesses; G. The approach to be adopted to witness familiarization and witness proofing. H. The status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber; I. The status of the decisions of the Pre-Trial Chamber in trial proceedings.

\(^{564}\) Ibid., para. 2.

\(^{565}\) Direction suspending the timetable on subjects that require early determination, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-942, TC I, ICC, 16 August 2007.

\(^{566}\) Order setting out schedule for submissions and hearings regarding the subjects that require early determination, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-947, TC I, ICC, 5 September 2007, paras 2-5.

\(^{567}\) Ibid.

\(^{568}\) Ibid. -475\), paras 4-7.


\(^{570}\) Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial, Prosecutor v. Lubanga, Situation in the DRC, ICC-01-04/01-06-1083, TC I, ICC, 13 December 2007, para. 1 (including: A. The role of the Office for Public Counsel for Victims; B. Disclosure by the defence; C. Scope of examination by a party not calling a witness; D. Statements by the prosecution and the defence; E. Live testimony by means of audio or video-link technology; F. Agreements on facts and evidence; G. Manner in which traumatized and vulnerable witnesses shall present their evidence. See also The Trial Chamber’s Agenda for the Status Conference on 12 March 2008 and scheduling order, ICC-01-04/01-06-1209, TC I, 5 March 2008, para. 1 (including: A. Whether two judges may hold a hearing; B. The protocol on the practices used to prepare and familiarise witnesses and the VWU recommendations on psycho-social in-court assistance; C. The
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The procedural terrain to be covered by the parties in trying to reach an agreement and by the Chamber in developing the trial procedures was substantial, and the elaboration of the trial proceedings was a complex process consuming considerable time and efforts on the part of all actors involved. It also generated multiple decisions of the Trial Chamber on various topics of trial procedure, including those identified as requiring early determination and those on further subjects for determination prior to the commencement of the trial. Some rulings were issued by Trial Chamber I on various matters relevant to the conduct of trial that came up ex sponte in the preparatory stage. Inevitably, some decisions had later to be revisited, as the preparation for the trial progressed. Furthermore, the exercise of shaping and refining the trial process in *Lubanga* spilled over to the actual trial, in particular regarding the issues relevant to the presentation of the defence case.

Notably, in *Lubanga* no separate procedural direction was issued by Trial Chamber I under Rule 140(1) regarding the conduct of the proceedings and testimony. The Chamber acknowledged the ‘broad agreement’ between the parties on, among others, the manner in which evidence shall be submitted, without commenting whether it effectively substitutes for admission of hearsay evidence; D. Redactions; E. The joint instruction of experts; F. Exchange of information on persons who have the dual status of witnesses and victims; G. Remote access to the e-court facilities; etc.).

571 E.g. Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1019, TC I, ICC, 9 November 2007; and, in the same case: Decision on the implementation of the reporting system between the Registrar and the Trial Chamber in accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, 9 November 2007; Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007; Decision on the procedures to be adopted for ex parte proceedings, ICC-01/04-01/06-1058, 6 December 2007; Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/04-01/06-1069, 10 December 2007; 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, ICC-01/04-01/06-1084, 13 December 2007; *Lubanga* victim participation trial decision (n 446); Decision on the E-Court Protocol, ICC-01/04-01/06-1127, 24 January 2008; Decision on certain practicalities regarding individuals who have the dual status of witness and victim, ICC-01/04-01/06-1379, 5 June 2008. Overviewing some of those decisions, see Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 514-23.

572 Decision on various issues related to witnesses’ testimony during trial, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1140, TC I, ICC, 29 January 2008 (‘Lubanga witness testimony trial decision’); Decision on agreements between the parties (n 492); Decision on the role of the Office of Public Counsel for Victims and its request for access to documents; ICC-01/04-01/06-1211, 6 March 2008; Decision on disclosure by the defence, ICC-01/04-01/06-1235, 20 March 2008; Decision on opening and closing statements, ICC-01/04-01/06-1346, 22 May 2008; Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, ICC-01/04-01/06-1351, 23 May 2008.

573 E.g. Decision on defence’s request to obtain simultaneous French transcripts, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1091, TC I, ICC, 14 December 2007; Decision on remote access to the broadcast of closed session proceedings, ICC-01/04-01/06-1142, 30 January 2008; Decision on whether two judges alone may hold a hearing -and- Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, ICC-01/04-01/06-1349, 22 May 2008.


575 E.g. Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-2192-Red, TC I, ICC, 20 January 2010; Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, *Prosecutor v. Lubanga, Situation v. DRC*, ICC-01/04-01/06-2127, TC I, ICC, 16 September 2009 (‘Lubanga victims’ questioning trial decision’); Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses, ICC-01/04-01/06-2340, 11 March 2010 (‘Lubanga personal interest decision’); Decision on judicial questioning, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-2360, TC I, ICC, 18 March 2010 (‘Lubanga judicial questioning decision’).
judicial directions. Essentially, this agreement, as supplemented by subsequent decisions, governed the *Lubanga* trial. The closer scrutiny of the terms of this agreement, as enhanced by issue-specific judicial rulings, is reserved for later. It bears noting though that, as is clear from the parties’ submissions from which the said agreement transpired, their mutual consent on the procedure to be followed at trial was not comprehensive and, for example, did not encompass the prosecution’s proposals on the presentation of its evidence in rebuttal. Furthermore, the agreement did not settle the issue of the special arrangements that might be required to facilitate testimony of a traumatized witness, a child (a former child soldier), an elderly person or a victim of sexual violence. This entails that until the issue was resolved by the Trial Chamber, the *Lubanga* trial proceeded in uncertainty as to whether the prosecutor would be allowed to have the second round of evidence-presentation and, in a similar vein, whether the defence would be entitled to a rejoinder. Although rebuttal and rejoinder were matters of remote concern at that early stage, the Chamber may be criticized for contenting itself with the ‘consensual’ approach and not putting an end to the parties’ disagreement on this matter as early as possible. As a result, it may have been unclear to the prosecution whether it would have to anticipate the possible defence evidence when presenting its own evidence.

In *Katanga and Ngudjolo Chui*, Trial Chamber II adopted a different approach in handing down the directions for the conduct of the trial and testimony. By contrast to Trial Chamber I’s incremental, ‘topic-by-topic’ approach in fleshing out the trial regime, Trial Chamber II produced the ‘omnibus’ guideline. For that purpose, it solicited from the parties, legal representatives, and the Registry information on a wide range of questions without classification into the topics early in the proceedings leading up to the trial. It invited them also to indicate what issues they wished the Chamber to rule on. For example, the list of 15 items the judges required information from the prosecution on included questions concerning: the status and foreseeable results of the ongoing investigations; the quantity of incriminating and exonerating pieces of evidence yet to be disclosed to the defence, including which charges and modes of responsibility they are directed and terms of disclosure; protective measures (including redactions) it intends to apply to the materials for disclosure; the projected number of witnesses and subject of their testimony; the length of evidence; the possibility of supplying the Chamber with summaries of their testimony etc. Besides the bulk of decisions regarding redactions, disclosure of the evidence and witness identities, and

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576 Decision on the status before the Trial Chamber of the evidence heard by the Pre- Trial Chamber (n 571), para. 2.
577 Decision on various issues related to witness’ testimony (n 572); Decision on the use of visual aids, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-1528, TC I, ICC, 2 December 2008; Decision on the admission of material from the “bar table”, ICC-01/04-01/06-1981, TC I, ICC, 24 June 2009. See also an oral ruling on Rule 140 contained in Transcript, ICC-01/04-01/06-T-104, TC I, ICC, 16 January 2009 (‘*Lubanga Rule 140 oral trial decision*’), at 35-8.
578 Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 436), at 519.
579 See Chapter 10.
580 Prosecution’s submission regarding the subjects that require early determination: status of the evidence heard by the Pre-Trial Chamber; status of decisions of the Pre-Trial Chamber; and manner in which evidence shall be submitted, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-953, OTP, ICC, 12 September 2007, paras 28-38; Conclusions de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: statut devant la Chambre de première instance des témoignages entendus par la Chambre préliminaire, statut des décisions de la Chambre préliminaire dans le cadre des procédures de première instance et modalités de présentation des éléments de preuve, ICC-01/04-01/06-1033, Defence, ICC, 12 September 2007, paras 45-6.
581 Prosecution’s submission regarding the subjects that require early determination, *ibid.*, para. 29.
582 *Katanga and Ngudjolo status conference order* (n 503), para. 5.
583 *Ibid.*, para. 9. For the list of questions to the defence, joint questions to the parties, questions to the legal representatives and joint questions to all participants, and Registry, see paras 10-14.
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protective measures for witnesses,\(^{584}\) the Chamber ruled on issues such as the presentation and disclosure by the Prosecution of all incriminating evidence in a form of a table and subsequent proposed amendments to it;\(^{585}\) the E-Court protocol;\(^{586}\) the provision of the interpretation;\(^{587}\) the common legal representation for victims;\(^{588}\) and the date of the commencement of the hearing on merits.\(^{589}\)

The Chamber’s decisions provided not what was a generalized but problem-oriented guidance, with the focus on the resolution of outstanding matters.\(^{590}\) Importantly, the ‘omnibus’ approach of was also employed in the context of Rule 140(1) procedure: the

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\(^{585}\) Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-956, TC II, ICC, 13 March 2009; Decision on the ‘Prosecution’s Motion to File Partial Table of Incriminating Evidence and Related Material, Confidential - Ex Parte, available to the Prosecution Only, on 4 May 2009 - Regulation 35’, ICC-01/04-01/07-1095, 4 May 2009; Decision on the Filing of a Summary of the Charges by the Prosecutor, ICC-01/04-01/07-1547-tENG, 21 October 2009; Decision on the “Prosecution's Application to Amend Paragraph 14 of the Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol of the Rome Statute (Art. 64)”, ICC-01/04-01/07-1132, 14 May 2009; Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses, ICC-01/04-01/07-1337, 27 July 2009; Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCCOT-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, ICC-01/04-01/07-1336, 27 July 2009; Decision on the Municipe request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, ICC-01/04-01/07-1553, 23 October 2009; Decision on the Prosecution's request for authorisation to add the signed record of questioning by P-219 to the Prosecution List of Incriminating Evidence, ICC-01/04-01/07-1772, 19 January 2010.


\(^{587}\) Decision on the interpretation of the court proceedings, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-1473, TC II, ICC, 15 September 2009 (providing the accused Katanga with the interpretation of Court proceedings into Lingala).


\(^{589}\) Decision on the Application by the Defence for Mathieu Ngudjolo for Postponement of the Commencement Date for the Hearings on the Merits (Rule 132(1) of the Rules of Procedure and Evidence), *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-1603-tENG, TC II, ICC, 5 November 2009.

\(^{590}\) See, for example, a seminal decision addressing a wide range of procedural matters raised by the Registry, including interpretation, witness familiarization and conduct, and testimony via video-link: Decision on a number of procedural issues raised by the Registry, *Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC*, ICC-01/04-01/07-1113, TC II, ICC, 14 May 2009.
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The Chamber adopted fairly comprehensive directions for the conduct of proceedings and testimony.\(^{591}\) This decision built upon and synthesized the observations by the parties and participants made on Trial Chamber II’s invitation.\(^{592}\) The Chamber acknowledged that save for several issues, the parties and participants were in agreement as to how the trial should be conducted; the detailed directions were nevertheless handed by the Presiding Judge, after consultation with the Chamber ‘in order to avoid any ambiguity and to provide clear guidance’.\(^{593}\) Consequently, the directions governed the sequencing of the Katanga and Ngudjolo Chui trial and the mode and order of examination of witnesses. They were supplemented by further specialized decisions on narrower subjects such as victim participation and other issues which came up in the course of trial.\(^{594}\) Unlike the ‘consensual’ approach taken in Lubanga, Trial Chamber II took a ‘pro-active’ position, which was arguably optimal at the dawn of the Court’s trial practice.

To conclude, the drafters’ solution to leave decisions on the most complex and critical issues of the trial process before the ICC to the Trial Chamber places an additional burden on the judges. Given that this task is to be discharged creatively and effectively prior to trial, on the top of other preparatory activities in the lead-up to trial, it may put a seriously strain on the Chambers’ resources. At the same time, the allocation to the judges of the role of ultimate architects of the trial regime provides them with significant leeway in tailoring the procedure to the circumstances and challenges of a specific case thereby enhancing maximize the fairness and efficiency of the procedural law. The workload related to the need to regulate anew the various aspects of trial proceedings are likely to decrease gradually as the Chambers will be in a position to rely upon the best practices developed previously, in the absence of the circumstances which warrant departure and lacking the parties’ objections on the part of the participants.\(^{595}\) It might take the Court several trials to be able develop an ‘optimal’ scheme for the trial proceedings in the ICC, based on the experience gained, if a unique scheme can indeed be discovered given that different situations will give rise to new issues and challenges and demand novel procedural solutions. One could hope for a degree of uniformity across different ICC Trial Chambers regarding the key issues such as the order of the proceedings at trial and modalities of examining evidence. This would enable the Court to remove the shroud of complete procedural uncertainty as to what the ICC trials should be conducted. As will be discussed in the next Chapter, the procedures adopted in the currently ongoing trials may be considered to be inclined towards the ‘adversarial’ model. This is in the limited sense that there is more than one case presented at trial, although crucial differences, including the implications of the institute of victim participation, render the label a misnomer. It is likely that the Court’s trial practice will be fragmented and vary from case to case not only with respect to nuances but also fundamental issues. This is not necessarily problematic, provided that the parties are provided full certainty and in a timely fashion as to the way of proceeding.

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591 Katanga and Ngudjolo trial directions (n 494).

592 Observations conjointes des Représentants légaux des victimes sur l’ordre de d’interrogation des témoins, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, ICC-01/04-01/07-1605, ICC, 6 November 2009; Defence submissions in respect of the application of Rule 140, ICC-01/04-01/07-1606, Defence (Katanga), ICC, 6 November 2009; Observations et propositions de l’Accusation sur l’interrogatoire des témoins en audience, ICC-01/04-01/07-1610, OTP, ICC, 6 November 2009. The defence for Ngudjolo Chui made no observations but informed the Chamber that it wished that rule 140 be applied: Katanga and Ngudjolo trial directions (n 494), para. 2.

593 Katanga and Ngudjolo trial directions (n 494), para. 3.


595 E.g. Decision on the procedures to be adopted for instructing expert witnesses, Prosecutor v. Bemba Gombo, Situation in the CAR, ICC-01/05-01/08-695, TC III, ICC, 12 February 2010, paras 10-13 (relying on the approach of TC I in its decision of 10 December 2007 on the same matter (n 571).
at trial. Indeed, some variation in the organization of trial proceedings does occur in other international criminal tribunals disposing of more than one Trial Chamber.

### 3.3.3 Commencement of trial

As noted, the mini-phase of ‘commencement of trial’ before the ICC temporally pertains to the trial stage, but the preliminary and preparatory nature of functions carried out then justifies dealing with it in this context. In advance of case-presentation, i.e. before the prosecutor’s opening statements, this interim stage is reserved for the reading of charges to the accused, measures taken by the Chamber to ensure that the accused understands them, and inviting him or her to admit guilt or to plead not guilty. This feature of the ICC trial architecture can be traced back to the Nuremberg and Tokyo trials which also featured an initial stage at which the indictment was read out and pleas made.\(^\text{596}\) The commencement of the trial may well be one of more climactic and solemn parts in the trial process where court appearances and interactions have symbolic and performative functions.\(^\text{597}\) Although the accused will by then be aware of the charges, their reading in court and obtaining a confirmation that they are understood is the way both to guarantee the fairness and orderliness of the process and to inform the broader audiences of the legal bases for holding the trial.\(^\text{598}\)

In order to satisfy the requirement that the Chamber must ensure that the accused comprehends the charges, or for other reason including a party’s request, a medical, psychiatric, or psychological examination of the accused may be ordered.\(^\text{599}\) For that purpose, the Chamber shall appoint one or more experts from the list of experts compiled by the Registry, or an expert approved by the Chamber at the party’s request.\(^\text{600}\) The reasons for ordering examination shall be placed on the record, which reflects the consideration that if the proceedings against the accused are stayed on medical grounds, this must be registered.\(^\text{601}\)

As noted in the previous Chapter, it is important to be aware of the temporal boundaries of the ‘commencement of trial’ distinguishing it from the proceedings leading up to trial because the former is anchored to the deadlines for the filing of various motions. First, Rule 133 stipulates that motions challenging 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 Chamber as per Rule 58. Such motions brought before and during the opening of the trial require no leave from the Chamber, whereas at a later stage the Chamber’s permission is necessary. In *Katanga and Ngudjolo*, a confusion became apparent as to when challenges to the admissibility of the case may be brought without leave of the Chamber.\(^\text{602}\) Secondly, different regimes apply to the consideration of motions concerning the conduct of the proceedings. During the proceedings leading up to trial, the Trial Chamber may rule, *proprio motu* or upon a party’s request, on any such issue.\(^\text{603}\) At the commencement of trial, the Chamber shall ask the parties whether they have

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\(^{596}\) Art. 24(a) and (b) IMT Charter; Art. 15(a) and (b) IMTFE Charter.

\(^{597}\) Terrier, ‘Procedure before the Trial Chamber’ (n 467), at 1285 (‘But it is customary, and is particularly necessary in order to inform the public and make the institution comprehensible, for the facts of the indictment to be solemnly restated at the start of any criminal trial.’).

\(^{598}\) Rule 135(1) ICC RPE. Other possible reasons for conducting examination of the accused are the defence of mental disease or defect excluding criminal responsibility as per Art. 31(1)(a) ICC Statute or a health complaint advanced by the accused. See Lewis, ‘Trial Procedure’ (n 452), at 544.

\(^{599}\) Rule 135(3) ICC RPE. The reason for including this provision was the intention to 'prevent the accused from duping inexperienced experts in order to avoid trial or criminal responsibility': Lewis, ‘Trial Procedure’ (n 452), at 545.

\(^{600}\) Rule 135(2) ICC RPE. See Lewis, ‘Trial Procedure’ (n 452), at 545.

\(^{601}\) See Chapter 7.

\(^{602}\) Rule 134(1) ICC RPE. The Rule further stipulates that such requests be done in writing and, unless they are of an *ex parte* nature, will be served on the other party and entitle the other party to respond.
any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearing; the same objections or observations may not be made subsequently without leave. After the trial commences, the Trial Chamber may rule on issues arising in the course of trial, acting *proprio motu* or on the party’s request. This power extends to the modification of the directions issued for the conduct of the proceedings under Article 64(8)(b) and is in this inherent in the authority of the trial court to control proceedings before it.

### 3.4. SPSC

#### 3.4.1 Introductory remark

As a part of the history of international criminal justice and an innovative experiment in the procedural law at the time, the SPSC procedures for setting the scene for trial merit brief attention. It must be noted though that the actual practice of the SPSC in this respect may have been significantly different from the ‘law in the books’.

In the SPSC, the receipt by the court of the written indictment and supporting materials presented by the public prosecutor pursuant to Section 24 of the TRCP, signified the formal transfer of authority to the trial panel. In contrast with the ICC procedure for the confirmation of charges, the presentation of the indictment was an *ex parte* procedure by nature and did not envisage a judicial review of the indictment. Along with the indictment itself, the prosecutor must present to the court ‘a list describing the evidence that supports’ it. Once the indictment was ‘presented’ by the prosecutor, the case file was registered by the Registry and forwarded to the panel to whom the case was assigned. The relevant panel then was seized with the matter, which was the point of departure for the start of trial proceedings.

It was the duty of the Registrar to ensure that the accused and the legal representative were promptly notified of the date on which the indictment was received and that they obtained a copy thereof. The notification of the date had a functional purpose as it triggered the lapse of procedural deadline: in this way, the accused and his counsel were notified of the right to submit a response to the indictment within 45 days of the receipt of the indictment by the court. The defence response to the indictment before the SPSC amounted to a blend between pre-trial and pre-defence briefs at the ICTY. Its contents were not limited to the factual and legal observations on the indictment and any preliminary motions the accused wished to raise, but also included a list of evidence and witnesses defence intended to present at trial. By the time of the notification by the Registry, the defence would normally have received the materials supporting the indictment made available by the prosecutor upon the presentation of the indictment to the District Court, including: (a) copies of all documentary evidence intended to be offered by the Prosecutor at trial; (b) all statements in the prosecutor’s possession of witness to be called at trial; (c) all information in any form in the prosecutor’s possession which tends to negate the guilt of the accused or to mitigate the gravity of the offenses charged in the indictment.

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604 Rule 134(2) ICC RPE.  
605 Rule 134(3) ICC RPE.  
606 The full extent of departures of the SPSC practice from the formal procedure is difficult to assess, among others, due to the absence of the transcripts of the proceedings in the Dili District Court.  
607 Section 26.1 TRCP.  
608 Section 24.2 TRCP.  
609 See also Chapter 7.  
610 Section 26.2 TRCP.  
611 See Section 27 TRCP. In more detail, see Chapter 6.  
612 Section 26.3 TRCP  
613 Section 24.4 TRCP.
3.4.2 Preliminary hearing

The submission of the defence’s response to the indictment pursuant to Section 26.3 of the TRCP or the expiration of the 45-day deadline upon the receipt of the indictment by the court imposed on the court the duty to summon the parties to a ‘preliminary hearing’, which was to be held 20 days thereafter. The first opportunity for the parties to appear before the trial court, this hearing served as crucial step in the progress of preparation for trial and in view of activities to be performed it compares to both the initial appearance and the pre-trial conference in the ICTY procedural model. The court was placed under a duty to satisfy itself that the accused had read or had had the indictment read to him and understood the nature of the charges; to ensure that the right of the accused to counsel had been respected; and to extend him an opportunity to make a statement concerning the charges – a plea of not guilty or an admission of guilt on all or some of the charges pursuant to Section 29A. A similar opportunity was to be provided subsequently at the opening of the trial.

Secondly, the preliminary hearing served as a forum to rule on any requests for evidence or additional investigation and, in the absence of such requests, to notify the accused of the respective rights. Like with pre-trial conferences in the ad hoc tribunals’ model, the panel could perform managerial measures on the cases as proposed by the parties, although the TRCP do not provide detailed guidance in this respect save for stipulating that the bench would review and decide on the parties’ requests for evidence. The managerial powers of the court could be exercised in relation to both cases equally pursuant to Section 29.3, which entitled it to issue ‘any necessary rulings’ upon review of the parties’ requests. Theoretically, the bench would be equipped to do so with regard to the prosecution case as it would have become familiarized with the materials supporting the indictment in accordance with Section 24.2. Fourthly, the panel may, acting proprio motu or upon the request of the accused, assess the necessity of the continued detention of the accused in the implementation of Section 20 of the TRCP (applicable mutatis mutandis), governing review hearings before the investigating judge. Finally, the panel could be moved by the accused or defence counsel to grant an extension of time for the preparation of the case and for the presentation of additional evidence. The purpose of preparatory hearings was to remove any obstacles for trial and, upon consultation with the parties, to set the date when the trial could begin.

3.4.3 Opening of trial

The SPSC procedural regime envisaged a distinct phase at the start of trial comparable with the ICC’s ‘commencement of the trial’. This opening hearing was reserved for formalities. Section 30.2 of the TRCP provided that on the date and time determined at the preliminary hearing in accordance with Section 29.3, a competent judge shall call upon the parties to a hearing, verify their identities, enter the respective information on the record, and declare the trial open. Uniquely in the SPSC context, the Presiding Judge shall also identify the judge-rapporteur who bears the primary responsibility for preparation of the final written decision in the case. Subsequently, as preliminary steps, the Court would verify the familiarity by the accused with the nature of the charges and ensure that his right to legal representation was observed, remind him of the right to remain silent, and invite him to make any statements or admissions in accordance with Section 29A. Should the accused decide to make such a
statement, he could be questioned about its contents by the court, possibly to be followed by the questioning by the prosecution and the legal representatives of the accused.\textsuperscript{623}

3.5 ECCC

3.5.1 Introductory remark

As noted in the previous Chapter, the delimitation of the trial stage of the ECCC proceedings is straightforward. The reason is the allocation of the trial functions to the Trial Chamber and the assignment of investigative work to the Office of Co-Investigating Judges (OCIJ), whereas the Pre-Trial Chamber deals only with the appeals from the OCIJ decisions and with disputes between the national and international principals of the OCIJ and the Office of Co-Prosecutors.\textsuperscript{624} The substantive distinction between the pre-trial and trial proceedings is about ways of converting the evidence on the dossier into the trial record, but the line between pre-trial and trial can be drawn on the basis of the structure of the ECCC IR.\textsuperscript{625} The trial proceedings commence when the Trial Chamber becomes seized with the Indictment from the Co-Investigating Judges or from the Pre-Trial Chamber.\textsuperscript{626}

The organization of the proceedings with view to trial preparation merits attention, particularly that the ECCC is uniquely representative of the ‘inquisitorial’ model in the family of international and hybrid criminal courts. The Co-Investigating Judges have a monopoly over investigations and conduct them proactively and unilaterally; the fact that they also execute requests for investigative actions filed by the parties does not affect the nature of investigations as judicial. However, like in contemporary civil law systems, the principle of immediacy dictates that all evidence on the dossier which forms the basis for the decision is adduced, examined, and challenged in open court.\textsuperscript{627} The principle entails an increase in the degree of active involvement by the parties, as compared to the investigative stage. In particular, the parties may propose calling witnesses and experts and participate in their questioning as well as in the examination of civil parties and of the accused at trial, which gives the trial process a slightly more adversarial touch. This is subject to the active role of the ECCC Trial Chamber judges in conducting questioning at trial. In order to be able to meaningfully and effectively conduct interrogations at trial, the trial judges are expected to be familiar with the substance of the case. In contrast with the ICTY, ICTR, and SCSL, the focus of trial preparation at the ECCC shifts to the preparation of the Chamber for the conduct of trial, rather than that of the parties.

Since the adoption of the ECCC Internal Rules in December 2007, the regulation of the preparatory stage of trial proceedings and of the trial itself underwent considerable changes. The purport of those reforms was to endow the phase with a more visible structure, while allowing the judges (and parties) sufficient means (information) to enable effective preparation. This is illustrated by the adoption of Rules that envisage the phase of ‘preparation of the trial’ (Rule 80), including the trial management meeting (Rule 79(7)) that is to be held at an early stage. Furthermore, within the trial, an initial hearing (Rule 80\textsuperscript{bis}) and a

\begin{footnotesize}
\begin{enumerate}
\item Section 30.5 TRCP.
\item ECCC Internal Rules 55-70 (on judicial investigations) and 71-78 (on the process before the PTC).
\item Section (E) of the ECCC IR is entitled ‘Proceedings before the Trial Chamber’, whereas Section D – ‘Pre-Trial Chamber Proceedings’ and Section C – ‘Judicial Investigations’.
\item Rule 79(1) ECCC IR.
\item See Rule 87(2) and (3) ECCC IR (‘Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination. … The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court.’) See Decision on Admissibility of Material on the Case File as Evidence, Kaing Guek Eav, Case File No. 001/18-07-2007/ECCC/TC, TC, ECCC, 26 May 2009, para. 6.
\end{enumerate}
\end{footnotesize}
substantive hearing (Rule 89bis) were instituted, vesting the trial with a sub-structure. The following paragraphs address the law governing those preparatory steps and the ECCC practice of applying it.

3.5.2 Trial management meeting
The second amendment to the ECCC Internal Rules introduced the so-called trial management meeting (TMM). The pre-existing provisions on trial preparation by the Trial Chamber contained in Rule 80, which will be discussed next, were enhanced to foresee a procedure to ensure a streamlined preparation for initial hearing. A procedural device for trial preparation designed to ‘facilitate the fair and expeditious conduct of the proceedings’, the TMM is a forum for the Chamber to confer with the parties or their representatives with a view to facilitating exchanges between the parties, setting the date of the initial and/or substantive hearings, and to reviewing the status of the case whereby the accused may raise relevant issues, including those of mental or physical health. For one thing, these rationales for the TMM make it appropriate to compare it with status conferences before the ICTY, ICTR, and SCCL. But while such conferences take place on several occasions and regularly over a certain interval of time or as the need may be, the TMM is only to be held once, as confirmed by the practice in the first case. For the other thing, another similarity is the form of a meeting: it shall normally be held in camera, unless the Trial Chamber rules otherwise.

Like with the ICTY and ICTR status conferences, a TMM may be held with counsel participating via tele- or video-conference; it may also be attended by the representatives of the Office of Administration and various units of the court, upon invitation by the Trial Chamber. For the Duch TMM, a number of sections and units were indeed invited. The Rules do not provide guidance as to the attendance of the accused. In Duch, the accused was invited to attend, but his presence was not mandatory, given the ‘mere technical and procedural’ nature of that meeting’s agenda. The civil parties were invited to be present as well, but only their lawyers were allowed to express the views on their behalf. The number of civil parties who could personally attend the TMM was limited to ten, with precedence to those who had no legal representation, while the remaining civil parties were to be accommodated in the public gallery.

In the initial ECCC practice, a written record and full transcript and audiovisual recording of the TMM was ordered; it was envisaged that a public version of the transcript would be made available upon redactions as necessary. However, no such transcript was

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628 For a general overview, see Chapter 7.
629 Rule 79(7) ECCC IR(Rev. 2, 5 September 2008).
630 Rule 79(7) ECCC IR.
632 Rule 79(7) ECCC IR. The first ECCC TMM was to be held in camera: Duch trial management meeting notification (n 631), para. 3 (ordering also that the participants not be robed).
633 Rule 79(8) ECCC IR.
634 In particular, the Court Management Section, the Defence Support Section, the Detention Unit through the Detention Liaison Officer, the Victims Unit and the Witness and Expert Support Unit: see Duch trial management meeting notification (n 631), para. 3. The representatives of those sections were required to attend the parts of the meeting relevant to their activities and to remain on stand-by for all remaining items; they were allowed to attend other parts of the meeting if they wished to. See Duch TMM agenda (n 631), para. 4.
635 Duch trial management meeting notification (n 631), para. 2; Duch TMM agenda (n 631), para. 3.
636 Duch TMM agenda (n 631), para. 5.
637 Ibid., para. 6.
638 Duch trial management meeting notification (n 631), para. 3.
released to the public, because it was decided to exclude the public and to keep the discussions confidential unless otherwise provided. The agenda of the TMM comprised, among others, the review of the status of each party, the health condition of the accused and witness-related issues, including protective measures and logistics for testimony at trial.

3.5.3 Preparation of the trial and pre-trial filings

Other than holding a TMM, the preparation for ECCC trials is conducted in writing. The current Rule 80, entitled ‘Preparation of the trial’, provides for the filing obligations the parties must fulfil prior to the initial hearing. The Co-Prosecutors shall submit to the Greffier of the Chamber a list of the witnesses and experts they intend to summon 15 days from the date the indictment becomes final. The Greffier shall place the list on the case file and, subject to any protective measures, forward a copy of the list to the parties. Moreover, where the accused or civil parties intend to call witnesses whose names do not appear on the Co-Prosecutors’ list, they shall submit an additional list to the Greffier within 15 days upon the notification of the Co-Prosecutors’ list, which is to be placed on the case file and communicated to the other parties as appropriate in view of protective measures. In contrast with the ICTY, ICTR, and SCSL trial-preparation regime, the date when the indictment becomes final automatically triggers the deadline for the submission of the relevant lists, irrespective of whether the Chamber issues an order to that effect.

Despite the fact that a separate Rule devoted to the preparation of the trial was adopted at the first revision of the ECCC Rules in February 2008, the requirement of pre-trial delivery of the lists of proposed witnesses and exhibits was already reflected in the original 2007 version of IR. In fact, Rule 80 came about as a result of drawing relevant provisions from the original Rule 79. As clarified by one ECCC staff member,

the rules as originally adopted provided for a number of preparatory steps typical of the French system adopted in the (then) draft Cambodian code of criminal procedure, such as the filing of witness lists and final decisions on admissibility of Civil Party applications received after the closure of the judicial investigation. However, it was recognized at the time of adoption of the rules (urgent in order to begin judicial investigations) that a later rules committee and plenary process should be organized before the first trial started, with stronger representation of the trial judges, to ensure that this process was sufficient for the specificity of trials before the ECCC. So the preparatory phase already existed from the start. Many of the amendments adopted in Rev. 1 were simply designed to regroup the existing provisions relating to this stage in one place.

The filing obligations of the parties are currently detailed in Rule 80(3). It authorizes the Chamber to order the parties, within a prescribed time limit prior to the Initial hearing, to file: (a) in addition to the above-referred lists of witnesses, a summary of the facts and the points in the indictment on which each witness is expected to testify as well as 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 the nature and content of the respective items; (c) an indication of the legal issues, if any, they intend to raise at the initial hearing; (d) a list of new documents they intend to offer, containing a brief description of their contents; and (e) a list

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639 Duch TMM agenda (n 635), para. 2.
640 Ibid.
641 Rule 80(1) ECCC IR.
642 Ibid. The caveat regarding protective measures was added in ECCC IR (Rev. 3, 5 September 2008).
643 Rule 80(2) ECCC IR. As with regard to the Co-Prosecutors’ witness and exhibits list, the notification duties were qualified by the need to implement protective measures at third amendment ECCC IR.
644 See Rule 79(2) through (5) ECCC IR (adopted on 12 June 2007).
645 Interview with a Legal Officer, ECCC-AO-01, ECCC, Phnom Penh, 31 January 2010, at 1.
646 Rule 80(3) ECCC IR (Rev. 6, 17 September 2010) incorporates the text of the (now deleted) Rule 79(9) which was added at the second revision ECCC IR (Rev. 2, 5 September 2008).
of uncontested facts, together, with a reference to the relevant evidence. While the
deadline for the submission of the additional information is not established, in Duch the
Chamber held that it is the same as for witness lists. The drafters of the ECCC Rules must
have considered the frequent contentions at the ICTY and ICTR concerning the sufficiency of
information contained in the pre-trial briefs, since they set the requirements the submissions
must comply with. Thus, a factual summary should be ‘sufficiently detailed to allow the
Chamber and the other parties to understand fully the nature and content of the proposed
testimony’, subject to any protective measures.

In the early stage of the preparation of the Duch trial, when scheduling the TMM, the
Trial Chamber ordered the parties to file the additional information on witnesses and experts,
such as an indication of which of the witnesses were covered by protective measures, with
reference to the decision providing for them, and an indication of the language in which each
witness was to testify. The item specified in Rule 80(3)(e) of the ECCC IR (a list of
uncontested facts with reference to the relevant evidence), was not mentioned in the order
because the amendment adding this item was made at a later time. However, the agreements
on facts eventually featured on the agenda and were discussed during the initial hearing.
Requesting the parties to submit such information was apposite since it might facilitate the
expeditious conduct of the trial. While the agreements on facts may only to a limited degree
substitute for the process of adducing and examining evidence in court, they certainly assist
the Chamber in streamlining the evidence-taking phase. But the Duch trial is believed to have
taken longer that it could or should have, given the extensive admissions of crimes by the
accused, insofar as the evidence adduced at trial often went to matters not contested by him.

The ultimate goal of the ‘preparation of the trial’ is to ensure that the case is trial-ready
and to determine the date of the forthcoming trial. Such date is set by the Trial Chamber’s
President on the basis of the time limits for notifications and summons. As soon as the date
is set, the Greffier of the Chamber notifies the parties in writing, which is deemed as valid
summons.

3.5.4 Initial hearing

At the first revision of the ECCC IR, Rule 80bis was added providing for an initial hearing.
With an initial hearing, the trial—as opposed to the broader interval of the trial proceedings—
formally commences, and the President of the Trial Chamber declares the initial hearing
open. It is remarkable that the trial formally starts before opening statements (as is the case
at the ad hoc tribunals and the SCSL), notwithstanding that activities taking place at the initial
hearing are preliminary in essence. The original 2007 version of the IR foresaw, at the early
stage of trial, a ‘preliminary hearing’ which was referred to as the ‘opening of trial’. This
phase was not as distinguishable in the chronology of the proceedings, but in fact it was

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647 The items (d) and (e) were added to Rule 79(9) at third revision (Rev. 3, 6 March 2009).
648 Transcript of Proceedings (Initial Hearing, Day 2), Kaing Guek Eav, Case File No. 001/18-07-2007-
ECCC/TC, TC, ECCC, 18 February 2009 (‘Duch initial hearing transcript’), at 35.
649 Rule 80(3)(a)(i) ECCC IR.
650 Duch trial management meeting notification (n 631), para. 4.
651 See Rule 87(6) ECCC IR (‘Where the Co-Prosecutors and the Accused agree that alleged facts contained in
the Indictment are not contested, the Chamber may consider such facts as proven.’).
652 On this criticism, see K. Gibson and D. Rudy, ‘A New Model of International Criminal Procedure? The
653 Rule 79(5) ECCC IR.
654 Rule 79(6) ECCC IR.
655 Rule 80bis(1) ECCC IR. The provision of the President’s declaration was added at second revision of ECCC
IR (Rev. 2, 5 September 2008).
656 See also Chapter 7.
657 Rules 82(1) and 83(1) and (3) ECCC IR (12 June 2007).
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precursor of the initial hearing as far as its functions are concerned. The emergence of a separate provision in February 2008 results from the regrouping of rules concerning procedure preceding the case-presentation phase.

The purpose of an initial hearing is twofold. First, the Trial Chamber shall consider the lists of potential witnesses and experts submitted by the parties before the hearing. It then determines whether hearing witnesses and experts proposed by the parties is ‘conducive to the good administration of justice’. In this respect, if a parallel is to be drawn with the ICTY/ICTR procedures, the initial hearing is the moment for the Chamber to implement functions similar to those carried out during or in the lead up to the Pre-Trial and Pre-Defence Conferences. In order to be able to make informed decisions as to whether certain witnesses and experts proposed by the parties should be called or whether additional evidence needs to be presented, the Trial Chamber needs sufficient time to familiarize itself with the case file and to adjourn before the initial hearing. In Duch, the hearing was scheduled in one month after the conclusion of the TMM.

Secondly, at the initial hearing the Chamber hears preliminary objections that challenge jurisdiction, require the termination of prosecution, or allege nullity of procedural acts made after the indictment is filed. Until the 5th revision of the IR in February 2010, the civil parties’ applications for participation in the proceedings were also to be dealt with at the initial hearing or, before Rule 80bis was introduced, at the ‘opening of trial’. However, currently the vetting procedure for the Civil Party applicants must to be completed by the Co-Investigating Judges by the time of the closing order. The reason for the reform was practical: the duty to process and vet the numerous civil party applications prior to the initial hearing was too onerous a burden on the Trial Chamber.

A broad-brush overview of the actual conduct of the two-day initial hearing in the Duch case illustrates the functions and rationales of this procedure. Upon a formal declaration of the opening of the hearing and after the recognition of the foreign lawyers for civil parties, the Trial Chamber considered the preliminary objection by the defence to the Chamber’s jurisdiction over the charges alleging crimes under 1956 Cambodian Criminal Code, in view of statutory limitations. Agreeing with defence’s request, the Chamber declared the objection admissible and held that it would be disposed of at the time of the judgment on the

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658 Rule 80bis(2) ECCC IR. Before the adoption of Rule 80bis ECCC IR (Rev. 1, 1 February 2008), the lists of potential witnesses and experts were considered at the ‘opening of the trial’, pursuant to Rule 83(1). The applicable standard was the same, but the IR stipulated that even when the standard was not met by the accused or the civil parties, the Chamber could ‘order that such person be summoned at the expense of the requesting party’; failing to reach a supermajority, the summons would be issued at the cost of the ECCC. For critical comments, see Chapter 7, section 2.5.

659 Interview with Legal Officer of the ECCC, ECCC-AO-01 (n 645), at 2 (in relation to the implications of making the structure of the trial more complex by dividing it into an initial and substantive hearing, noting that ‘[o]ne, perhaps unintended result, was that the TC was able to meet within the required period after the closing order to extend Duch’s detention, then adjourn for a significant period before opening the trial.’).

660 Order Setting the Date of the Initial Hearing, Kaing Guek Eav, Case File No. 001/18-07-2007/ECCC/TC, TC, ECCC, 19 January 2009 (ordering that the initial hearing begin on 17 February 2009).

661 Rules 80bis(3) and 89(1) ECCC IR.

662 Rule 82(1) ECCC IR(12 June 2007) as amended (Rev. 1, 1 February 2008). This Rule was subsequently repealed: cf. Rule 83 ECCC IR (Rev. 5, 9 February 2010).

663 Rule 23bis(2)and (3) ECCC IR(Rev. 5, 9 February 2010) (‘The Co-Investigating Judges may reject Civil Party applications at any time until the date of the Closing Order. … Until and unless rejected, Civil Party applicants may exercise Civil Party rights. … When issuing the Closing Order, the Co-Investigating Judges shall decide on the admissibility of all remaining Civil Party applications by a separate order.’).

664 Interview with Legal Officer, ECCC, ECCC-AO-01 (n 645), at 1 (‘one aspect that the TC found difficult to achieve in the time was the vetting of civil parties, leading to the current move to have all vetting achieved by the time of the closing order.’).

merits. Given that none of the parties informed the Chamber, prior to the hearing, of the legal issues to be raised pursuant to then Rule 79(9)(c) (now Rule 80(3)(c)) of the ECCC IR, the Chamber allowed them an opportunity to do so during the hearing. The Trial Chamber addressed next the question of the agreements on facts. It explained that such agreements have no binding effect on the Chamber with regard to the conduct of trial and only facilitate the Chamber’s analysis of evidence. The Chamber remarked that such agreements may affect its decision to call certain witnesses and experts and to admit new proposed evidence. Further, it is striking, yet unsurprising, that the discussion of the parameters of admissibility of the civil party applications and the analysis of individual applications consumed a significant amount of time at the hearing. The final matter worth noting is the consideration of the witness and expert lists submitted by the parties. Reportedly, the Co-Prosecutors’ list consisted of 35 witnesses, including the two civil parties who remained on the list just in case they intended to abandon their victim status in order to be able to testify, and the time estimate for the case-presentation amounted to 40 trial days. The defence complained of the inadequacy of all of the Co-Prosecutors’ witness summaries provided in view of their generality.

The witness lists filed by the civil parties and by the defence were also reviewed in the closed session of the Duch initial hearing. Such an assessment was tentative, given the need for more time and information for the Chamber to be able to decide on some of summons. For the purpose of determining whether summoning specific witnesses is conducive to the good administration of justice, the Chamber applied the admissibility standard of Rule 87, namely, whether the proposed testimony would be irrelevant, repetitious, impossible to obtain within a reasonable time, unsuitable to prove facts it purports to prove, or not permitted under the law. The Chamber held that where the parties have agreed on facts, testimony to such facts may not be necessary; and, indeed, the two witnesses expected to testify to the facts not contested by the defence were stricken out of the list. Furthermore, the Chamber stated that it may refuse to summon a witness where his or her contact details were incomplete, since it was for the party that requests for the witness to be summoned to provide the exact address or information sufficient for the Chamber to be able to locate the witness. As a result, thirty-nine witnesses and experts were accepted; the decision on seventeen was postponed; and one witness would be called by the Chamber itself.

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666 Duch transcript, 17 February 2009 (n 665), at 8-9.
667 Ibid., at 9-11. The prosecution raised the issue of applicability of the concept of JCE, the defence – that of the nine-year long provisional detention of Duch; the civil parties raised no specific issues.
668 Ibid., at 15.
669 Ibid. The defence indicated that it would not contest the facts testified to by the witnesses for the Civil Parties’ group 3: see ibid., at 100-1.
670 Ibid., at 21-67. Among others, the arguments as to whether a spouse of a deceased civil party may continue the action were heard, with a decision issued subsequently: see Decision on Motion Regarding Deceased Civil Party, Kaing Guek Eav, Case File No. 001/18-07-2007/ECCC/TC, TC, ECCC, 13 March 2009, para. 13 (authorizing the husband to succeed his late wife in the civil party action).
671 Duch transcript, 17 February 2009 (n 665), at 71-2. In this respect, Judge Cartwright noted that ‘any civil party whose testimony can be conducive to the ascertainment of the truth may nonetheless be summoned to appear in court. At the time they appear in the court to testify, their status as a civil party will be taken into account. If they do not renounce their civil party status, the prohibition on taking the witness oath under Rule 23(6) will apply.’
672 Ibid., at 74-6.
673 Ibid., at 82-115. The number of the proposed witnesses was five for the civil parties’ group 1; ten for the group 2; three for the group 3; and no witnesses for group 4. The defence intended to summon 13 witnesses, with a total time estimate of four and a half trial days.
674 Duch initial hearing transcript, 18 February 2009 (n 648), at 2.
675 Ibid., at 1-2.
676 Ibid., at 2 and 5-6.
677 Ibid., at 2 and 4-5.
678 Ibid., at 3-5.
Finally, in the course of the initial hearing, the Chamber heard the motion of the Co-Prosecutors and arguments of all parties as to whether the new evidence proposed by the Co-Prosecutors, in particular a number of documents and the Vietnamese film footage of S-21 security prison, could be admitted. In a system where the investigation is conducted by the CIJ in the pre-trial, the admission of new evidence originating from one of the parties before the trial is conceived of as an exceptional measure because such admission occurs outside of the framework of judicial investigation. In a written decision issued after the conclusion of the hearing, the Chamber considered that the provisional admissibility of the materials depends on: (i) the timeliness of filing or, in the exceptional circumstances, the impossibility to comply with the deadline and the compliance with the requirement of filing at the earliest opportunity; (ii) *prima facie* relevance to the ascertainment of the truth, subject to the assessment of the evidence at the substantive hearing. Based on these parameters, the Chamber provisionally admitted the two sets of proposed items, subject to the review of relevance and authenticity during a substantive hearing. Several months into the *Duch* trial, the film footage was excluded under Rule 87(3) on the grounds that, first, it went to uncontested facts and was thus superfluous and, secondly, the verification of its authenticity would require additional investigations and significantly delay the proceedings.

3.6 STL

3.6.1 Introductory remark

The overview of the main features of pre-trial process before the STL was provided previously. Given the limited pre-trial practice at the STL so far, this section outlines the standards governing trial preparation in the STL context and focus on the innovations STL introduced in its RPE. In constructing the STL pre-trial process, the drafters of the Rules relied heavily on the model and experiences of the ICTY, although unique features of the STL procedure (notably, the participation of victims) added nuances unknown in the context of the *ad hoc* tribunals and the SCSL.

3.6.2 Initial appearance

Similarly to the *ad hoc* tribunals and the SCSL, the transfer of the accused to the seat of the STL (or the execution of the summons to appear or an arrest warrant) marks an important moment in the judicial pre-trial phase. Differently through, a broader range of pre-trial functions than at the ICTY are to be exercised by the PTJ in the preceding period. The significance of an initial appearance is reduced as compared to other courts, due to the possibility of conducted in absentia proceedings. Subject to all relevant guarantees and preconditions, the initial appearance is not a mandatory event for the case to proceed further.

STL Rule 98, based on Rule 62 of the ICTY RPE, prescribes that the accused be brought before the Trial Chamber or a judge designated by the President without delay in order to be formally charged. The possibility for the single judge to conduct an initial appearance, similarly to the other courts, was introduced in October 2009. The rationale for holding the

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679 Ibid., at 35-52; *Duch* initial hearing agenda (n 665), at 2 (item 5).
681 Ibid., paras 7 and 12 (the Chamber was satisfied that the said film footage could not have been obtained earlier and is *prima facie* material).
683 See Chapter 6.
684 Rules 88, 89, 92, and 93 STL RPE.
685 Art. 22 STL Statute; Rule 106 STL RPE.
686 See Rule 98(A) STL RPE (STL/BD/2009/01/Rev. 02, 30 October 2009).
initial appearance are the same as in other courts. First, the Chamber or the judge shall ensure that the right of the accused to counsel is respected. Where no counsel is chosen, the Head of the Defence Office may assign one for the purpose of representing the accused at the initial appearance and at any further appearance, if necessary for entering a plea. Secondly, the accused shall read or have the indictment read to him in a language which he or she understands and the judge(s) will ensure that the accused comprehends the charges. Thirdly, the Trial Chamber or the judge shall inform the accused that, within seven days from then, he or she will be called upon to enter a plea of guilty or not guilty on each count and that there is a possibility of doing so immediately on one or more counts. Thus, like in the ICTY Rules, the provision is made for holding a further appearance, although the interval within which this must be done is reduced from thirty days to seven. Should the accused fail to enter a plea at the initial or at the further appearance, a plea of not guilty is entered on his or her behalf. Where such a plea is entered, the Chamber or the Judge—rather than the Registrar, as is the case at the ICTY, ICTR and SCSL—shall set the date for trial or for a status conference, as appropriate. In case the accused pleads guilty, the Chamber shall act in accordance with Rule 100, i.e. verify the validity of the plea under the relevant parameters. Unlike ICTY Rule 62(A)(vi), Rule 98(A)(vi) of the STL RPE does not distinguish between the courses of action to be taken depending on whether the initial or further appearance takes place before a single judge or before a full Trial Chamber. Given that Rule 100 only mentions the Trial Chamber, the question arises whether the single judge is authorized under the STL Rules to receive a plea of guilty. Given the importance of the determination of the validity of a plea, the preferred option would be to adopt the approach reflected in the rules of other courts, i.e. reserving guilty pleas to hearings held before the full Chamber and envisaging a procedure for a referral of such a plea from a single judge. Finally, the fourth function exercised by the Chamber or the judge at the initial hearing is setting dates other than the date for trial, as appropriate. This is equivalent to the power of the ICTY judges to instruct the Registrar to set such other dates.

The initial appearance triggers the lapse of several deadlines provided for in the STL RPE: (i) holding a further appearance, within seven days after it; (ii) holding of a status conference, within a reasonable period and not more than eight weeks after it; and (iii) the prosecutor’s disclosure of copies of the supporting material which accompanied the indictment and the statements obtained by the prosecutor from the accused, within thirty days or within any other time-limit prescribed by the PTJ.

### 3.6.3 Pre-trial and pre-defence filings and PTJ’s file

Next to duties related to the confirmation of an indictment and investigative measures (e.g. exceptional gathering of evidence and questioning of anonymous witnesses under Rules 92-93), the STL PTJ discharges the tasks of case-management with view to speeding up the pre-

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687 Rule 98(A)(i) STL RPE.
688 Rule 98(B) STL RPE.
689 Rule 98(A)(ii) STL RPE.
690 Rule 98(A)(iii) STL RPE.
691 Rule 98(A)(iv) STL RPE.
692 Rule 98(A)(v) STL RPE. The possibility of setting a date for a status conference was added on 30 October 2009 (STL/BD/2009/01/Rev. 2).
693 See Chapter 6.
694 Rule 98(A)(vii) STL RPE.
695 Rule 62(A)(vii) ICTY RPE.
696 Rule 98(A)(viii) STL RPE.
697 Rule 94(A) STL RPE.
698 Rule 110(A)(i) STL RPE.
699 Art. 17(1) STL Statute; Rule 68 STL RPE.
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The PTJ establishes the working plan which indicates the filing and other obligations of the parties and the terms of compliance with them. He will also be responsible for overseeing the implementation of that plan, the progress of discussions between the parties and, eventually, for setting—in consultation with the parties, the Registrar, the Trial Chamber’s Presiding Judge, and possibly the STL President—a tentative date for the start of trial proceedings at least four months prior to that date.

In substance, the obligations arising from the working plan consist of pre-trial filings to be made by the parties. Rule 91(G) obligates the PTJ to order the prosecution to file, within the time-limit set by him and no later than six weeks before the Pre-Trial Conference, the documents analogous to the ICTY prosecutor’s pre-trial filings. Moreover, within the same timeframe, the victims participating in the proceedings will also be expected to file a list of witnesses that they would like the Chamber to call and the list of exhibits they would like the Chamber to admit into evidence. This unprecedented obligation of victims is the precondition for the victims to exercise their right to request that evidence be presented on their behalf at trial. Finally, after the prosecution files its pre-trial brief and witness and exhibit lists, the defence shall be ordered, before the deadline set by the PTJ and in any case earlier than three weeks before the Pre-Trial Conference, its pre-trial brief addressing factual and legal issues and, in general terms, the nature of the defence of the accused, the matters which the defence disputes in the prosecutor’s brief and, for each such matter, the reasons for disagreement.

The pre-trial filings by the parties and participating victims received by the PTJ shall be compiled into a complete indexed file, to be submitted to the Trial Chamber, along with any evidentiary material received by the PTJ, transcripts of status conferences, minutes of meetings convened by the PTJ, his orders and decisions, correspondence with relevant entities; and a detailed report. The PTJ report sets out, among others, the arguments of the parties and victims on the facts and law; the points of agreement and disagreement; the probative material produced by the participants; a summary of PTJ’s decisions and orders; and PTJ’s suggestions regarding the number and relevance of the proposed witnesses. This report culminates the work done by the PTJ in the preliminary analysis of the projected case and in shaping it in such a way that would ensure fair and expeditious trial proceedings.

Therefore, the PTJ file is highly instrumental for the Trial Chamber. First, its status will predetermine which of the avenues foreseen in Article 20 of the STL Statute the Trial Chamber will follow in questioning witnesses. Secondly, the file serves the Chamber as an indispensable introduction into the case, enabling it to anticipate the factual and legal issues that may arise in the proceedings, as well as possible areas of agreement, and to exercise

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700 STL Rules of Procedure and Evidence (as of 12 April 2012) – Explanatory Memorandum by the STL’s President (‘STL RPE Explanatory Memorandum’), para. 11.
701 Rule 91(A) STL RPE.
702 Rule 91(B) and (C) STL RPE.
703 Rule 91(G) STL RPE. This includes: (i) the final version of pre-trial brief, including, for each count, a summary of evidence, any admissions by the Parties and a statement of matters not in dispute; (ii) a list of witnesses with required particulars for each witness (the name or pseudonym; a summary of facts and the points of indictment to which testimony is expected to relate; the total number of witnesses and the number of witnesses who are expected to testify against each accused and on each count; a mode of testimony; the estimated length of time to be taken for the examination-in-chief of each witness and the total time estimated for the presentation of the Prosecution case); and (iii) the list of exhibits the Prosecutor intends to offer stating, where possible, whether the Defence has any objections as to authenticity (also to be disclosed to Defence). Cf. Rule 65ter(E) ICTY RPE.
704 Rule 91(H) STL RPE.
705 Rule 87(B) STL RPE. (‘At the trial stage, a victim participating in the proceedings may request the Trial Chamber to authorise him, after hearing the Parties, to call witnesses and to tender other evidence.’).
706 Rule 91(I) STL RPE.
707 Rule 95(A) STL RPE.
708 Rule 95(A)(vii) STL RPE.
709 Rule 145 STL RPE.
managerial functions at the Pre-Trial Conference. The completeness of the PTJ’s file is crucial for the effective preparation for the trial because unlike the ICTY PTJ, the STL PTJ is not a member of the Trial Chamber which tries the case. Thus, if any lessons can be drawn from the ICTY experience, the STL PTJ may lack strong incentives for narrowing down the issues for trial and tackle matters which could impact the scope of the case to be tried, and he may be likely to defer them for resolution by the Trial Chamber. However, as the judicial authority who has communicated with the parties directly throughout the pre-trial, compiled the complete file, and examined the materials on a first-hand basis, the PTJ’s recommendations and suggestions to the Trial Chamber can be expected to be utterly useful.

Similarly to the \textit{ad hoc} tribunals, the defence at the STL is expected to file more detailed information regarding its evidence prior to presenting its case. Rule 128 of the STL RPE, which sets the functions to be exercised after the close of the prosecutor’s case, prescribes that in case the defence elects to adduce evidence, the Trial Chamber shall order it to file: (i) a list of witnesses, with a number of particulars identical to those required from the prosecution pre-trial;\textsuperscript{710} (ii) a list of exhibits the defence intends to offer, stating, where possible, whether the prosecutor has objections regarding authenticity (which are also to be served on the prosecutor). Therefore, as far as the pre-trial and pre-defence filings by the parties are concerned, the STL Rules present no significant innovations. The remarkable feature of its pre-trial regime is the unprecedented filing duties incumbent upon the participating victims. The ways for the Chamber to put the case materials obtained from the parties to use, in the context of the managerial conferences, are addressed next.

3.6.4 Conferences

\textbf{A. Status Conferences}

The STL Rules prescribe that the PTJ shall conduct status conferences. Those serve functions identical to those of status conferences at the ICTY, namely: (i) organizing exchanges between the parties so as to ensure expeditious preparation for trial; and (ii) review the status of the case and allow the parties the opportunity to raise issues in relation thereto, including mental and physical condition of the accused.\textsuperscript{711} One difference is that at the STL, the first status conference is convened ‘within a reasonable period after the initial appearance of the accused and not more than eight weeks after it’, after which they are to be held regularly every eight weeks, unless ordered otherwise.\textsuperscript{712} As noted earlier, the respective interval for the ICTY is one hundred and twenty days, i.e. the period twice as long.\textsuperscript{713} Subject to the written consent of the accused and upon advice of defence counsel, Rule 94 allows the option of conducting a status conference in the presence of the accused, but with his counsel participating either via tele- or video-conference; or in the absence of the accused, but with him and/or his counsel participating via tele- or video-conference.\textsuperscript{714}

\textsuperscript{710} Rule 128(i) STL RPE. This information includes: (a) the name or pseudonym of each witness; (b) a summary of facts on which each witness is expected to testify; (c) the points in the indictment as to which each witness is expected to testify, including specific reference to counts and paragraphs in the indictment; (d) the total number of witnesses and the number of witnesses expected to testify for each accused and on each count; (e) an indication of the mode of testimony; and (f) the estimated length of time for examination-in-chief of each witness and the total time for presentation of the defence case.

\textsuperscript{711} Rule 94(A) STL RPE.

\textsuperscript{712} Rule 94(A) STL RPE.

\textsuperscript{713} Rule 65bis(A) ICTY RPE.

\textsuperscript{714} Rule 94(B) STL RPE.
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B. Meetings convened by the Pre-Trial Judge

As part of the implementation of the PTJ’s working plan, the PTJ shall order the parties to meet to discuss issues related to the preparation of the case, pursuant to Rule 91(D). Such meetings are akin to the Rule 65ter meetings at the ICTY, with the difference that the PTJ may also invite victims participating in the proceedings to attend. This is apposite given the victims’ right to call witnesses and tender evidence at trial as well as to (cross-)examine witnesses, if so authorized by the Chamber.\(^{715}\) This right entails that the victims participating in the STL proceedings are subject to disclosure duties.\(^{716}\) Therefore, it may be necessary to stipulate the terms of those duties and to monitor compliance as part of the implementation of the working plan established by the PTJ. Otherwise, the provision is made for the Rule 91 meetings to be held inter partes or, if the PTJ so decides at the request of a party, ex parte; the presence of the accused at these meetings is not required.\(^{717}\) This indicates that such meetings are informal and reserved for household matters.

In contrast with the ICTY Rule 65ter meetings, the STL Rules do not envisage that the assistance may be provided to the PTJ by a Senior Legal Officer. This is remarkable, given that in 2006, (then) future STL President Antonio Cassese, in his capacity as Independent Expert, recommended that the SCSL Judges assign a SLO to assist the Trial Chamber judge in conducting pre-trial work.\(^{718}\) One possible explanation for not adopting the ICTY model in this regard is the institutional difference between the ICTY and the STL. One rationale for allowing SLOs at the ICTY to conduct pre-trial meetings with the parties was to alleviate the burden on the pre-trial judges who could simultaneously be a member of a trial bench in another ongoing trial, besides the case in issue. But the STL PTJ’s functions are exclusively focused on pre-trial work. Secondly, the drafters of the STL Rules may have also considered that the ICTY’s solution of entrusting the coordination of pre-trial communication to SLO has not justified the promises of greater efficiency, given the criticism voiced against this modality.\(^{719}\)

C. Pre-Trial and Pre-Defence Conferences

The provisions are made in the STL Rules for the coordination of the pre-trial communication between the parties, as well as for the delivery of their pre-trial briefs along with accompanying materials to the PTJ, who in turn submits the complete file to the Trial Chamber. In light of the pre-trial procedure in the ad hoc tribunals and the SCSL, it is no surprise that the STL Trial Chamber has a number of managerial duties to perform with reference to that file in order to prepare the case for trial. For that purpose, the STL RPE install the mechanisms such as Pre-Trial and Pre-Defence Conferences. Prior to the commencement of the trial, the Chamber shall hold one or more inter partes Pre-Trial Conferences, as appropriate.\(^{720}\) Prior to the commencement by the defence of its case, one or more inter partes Pre-Defence Conferences shall be held.\(^{721}\) Thus, in contrast to the ICTY, ICTR and SCSL, the STL Pre-Trial and Pre-Defence Conferences are not necessarily a one-time event. This is a welcome development, because the objective of rendering the case it in all respects trial-ready may require the court and parties to convene several times in order to remove any obstacles and address disagreements before the trial commences. Moreover, both types of conferences are mandatory, which is attested by the use of the word ‘shall’ rather

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\(^{715}\) Rule 87(B) STL RPE.

\(^{716}\) Rule 112bis STL RPE (STL/BD/2009/01/Rev. 2, 30 October 2009).

\(^{717}\) Rule 91(D)-(F) STL RPE.

\(^{718}\) See supra nn 113-114 and accompanying text. See also SCSL Cassese Suggestions (n 96), at 17 (proposed Rule 73quarter(C) SCSL RPE).

\(^{719}\) See supra 3.2.3.B.

\(^{720}\) Rule 127(A) STL RPE.

\(^{721}\) Rule 129(A) STL RPE.
than ‘may’ as is the case with the Pre-Defence Conferences before the ICTY, ICTR, and SCSL.\textsuperscript{722}

The regulation of the powers of the judges of the Trial Chamber in the context of the conferences is concise, compared to ICTY, ICTR, and SCSL Rules 73\textit{bis} and 73\textit{ter}. On both occasions, the Trial Chamber possesses the general power to ‘give such directions necessary or desirable to ensure a fair, impartial, and expeditious trial’.\textsuperscript{723} More specifically, this power includes, as far as the Pre-Trial Conferences are concerned: (i) calling upon the prosecutor to shorten the estimated length of the examination-in-chief for some or all witnesses; (ii) determining the number of witnesses the prosecutor may call; and (iii) determining the time available to the prosecutor for the presentation of evidence.\textsuperscript{724} The formulation of these competences follows closely Rule 73\textit{bis}(B) and (C) of the ICTY RPE, rather than the correspondent ICTR and SCSL Rule 73\textit{bis}(C) and (D). However, the power given to the ICTY and SCSL trial judges to \textit{invite} the prosecutor to reduce the number of counts and to \textit{fix/determine} a number of crime sites or incidents comprised in the charges that are ‘reasonably representative’ as well as the even more controversial prerogative, unique to the ICTY, to \textit{direct} the prosecutor to select the counts are conspicuously absent from the STL Rule.\textsuperscript{725} The reason for that is, of course, the nature of the STL as a tribunal designed to deal with one single criminal incident. The chance for such powers ever to be used is as limited as the likelihood that the STL prosecutor’s charging practices would take a dimension comparable to that before the ICTY or that they would come to be considered as problematic.

The victims participating in the proceedings may be allowed to call witnesses, to tender evidence, and participate in the examination of witnesses. Therefore, there should be a possibility for the Chamber to order them to file their witness and exhibit lists before the Pre-Trial Conference. But the STL Rules do not provide for any specific powers of the Trial Chamber to manage the ‘victims’ case’ or to limit the estimated length of (cross-)examination prior to the commencement of the trial. While envisaging that such competences may or shall be exercised at the Pre-Trial Conference would have been logical, it is arguable that, in any event, the Chamber’s power to do so is implied in its authority to exercise control over the examination by victims and to disallow them to call witnesses under Rule 87(B).

The case-managerial powers that the Trial Chamber has at the Pre-Defence Conference(s) are analogous to those invoked in relation to the prosecutor’s case and identical to the competences accorded to the ICTY judges for the purpose of trimming the defence case. Namely, the Chamber may call upon the defence to shorten the estimated length of the examination-in-chief for some or all witnesses, determine the number of witnesses, and limit the time available for the presentation of the defence evidence.\textsuperscript{726}

Furthermore, unlike Rules 73\textit{bis} and 73\textit{ter} of the other tribunals, neither STL Rule 127 nor Rule 129 set forth the possibility for any of the parties, in the course of trial, to seek leave from the Trial Chamber to add witnesses or exhibits to their lists; to reinstate those lists, or to request additional time for the presentation of evidence. However, this omission was not intended to preclude the Trial Chamber from considering and granting such requests, where appropriate, given the general inherent power of the Trial Chamber to control the proceedings. Such a power has been relied upon by the ICTY,\textsuperscript{727} and there is not reason why it should not equally be available to the STL Trial Chamber.\textsuperscript{728} In the STL practice thus far, the prosecutor sought to amend his witness or exhibit lists with reference to Rule 91(G) STL RPE. The absence of a specific rule did not preclude the PTJ and the Chamber from considering and

\textsuperscript{722} Cf. Rule 73\textit{ter}(A) ICTY, ICTR, and SCSL RPE.
\textsuperscript{723} Rules 127(B) and 129(B) STL RPE.
\textsuperscript{724} Rule 127(C) STL RPE.
\textsuperscript{725} \textit{Ibid.} Cf. Rule 73\textit{bis}(D) and (E) ICTY RPE; Rule 73\textit{bis}(G) SCSL RPE.
\textsuperscript{726} Cf. Rule 73\textit{ter}(B), (C) and (E) ICTY RPE.
\textsuperscript{727} \textit{Supra} nn 161 and 233 and accompanying text.
\textsuperscript{728} Rule 130(A) STL RPE (‘The Trial Chamber, after hearing the parties, may give directions on the conduct of the proceedings as necessary and desirable to ensure a fair, impartial, and expeditious trial.’).
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granting such requests in the interests of justice, subject to a legal test borrowed from the ICTY. 729

Finally, similarly to Rule 90(G) of the ICTY RPE, the STL Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 91 and 128. 730 The sub-Rule does not stipulate, however, that the Chamber shall refuse to hear any additional witnesses, which implies that it retains discretion in this respect and may decide to grant leave, if appropriate.

3.7 Summary

Any endeavour to synthesize into one coherent picture the patchwork of standards governing trial-preparation and respective practice in various international and hybrid tribunals, is bound to oversee important nuances in individual jurisdictions. The exercise invites a degree of generalization and by definition can capture only most crucial similarities and differences between them. Bearing this in mind, the three main areas have been explored, and the following summarizes key findings in this regard, which includes the organizational forms of trial preparation; the filing duties of parties towards the trial court; and the scope of managerial powers of trial judges.

3.7.1 Forms of trial preparation

A variety of pre-trial conferences and meetings used to further the preparation of trial and to manage the volume of the case as projected by the parties, can be discerned in the law and practice of the tribunals. The functions fulfilled by these forms of organizing pre-trial work may diverge despite identical denominations – for example, the nature of a ‘status conference’ before the ICC differs from that of the same-titled conference before the ICTY model-based tribunals and it serves a broader range of functions. 731 Conversely, pre-trial conferences termed differently in various courts may in fact encompass substantively the same type of work for the judges and the parties, or at least have a significant overlap in the functions. 732

The first category of meetings—labeled uniformly in the ICTY, ICTR, SCSL, ICC, and the STL as ‘status conferences’, except for the ECCC whose Internal Rules envisage TMMs—comprises formal pre-trial meetings held by the Trial Chamber or its judge with the parties. The core objective is to monitor the status of the case and to ensure that outstanding issues are swiftly brought to resolution. The ways by which that objective is to be achieved are relatively the same in all relevant jurisdictions: (i) organizing exchanges between the parties in order to ensure an expeditious preparation for trial and the expeditious and fair conduct of trial proceedings; 733 (ii) to review the status of the case and to allow the accused the opportunity to raise issues in relation thereto, including his mental and physical

729 Decision Authorising the Prosecution to Amend its Exhibit List and to Redact Exhibit 55, Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/TC, TC, STL, 19 November 2013, para. 4 (‘the Chamber must balance the Prosecution's interest in presenting any available evidence against the rights of an accused person to adequate time and facilities to prepare for trial. General factors for consideration include: i) whether the proposed evidence is prima facie relevant and probative; ii) whether the Prosecution has shown good cause for not seeking the amendments at an earlier stage; iii) the stage of the trial; and, iv) whether granting the amendment would result in undue delay.’); Decision on the Prosecution Submission Pursuant to Rule 91(G)(ii) and (iii), Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/PTJ, PTJ, STL, 18 September 2013, para. 11.
730 Rule 150(H) STL RPE.
731 E.g. cf. Rule 132 ICC RPE and Regulation 54 Regulations of the Court, with Rule 65bis ICTY, ICTR and SCSL RPE.
732 E.g. cf. Rule 132 ICC RPE (‘status conferences’) with Rule 79(7) ECCC IR (‘trial management meeting’).
733 Rule 65bis(A)(i) ICTY RPE; Rule 65bis(A) ICTR RPE; Rule 65bis(i) SCSL RPE; Rule 132(2) ICC RPE; Rule 79(7) ECCC IR; Rule 94(A)(i) STL RPE.
condition;\textsuperscript{734} (iii) to set or to facilitate the setting of the date for trial, such as in case of the first status conference before the ICC and for trial management hearings in the ECCC.\textsuperscript{735}

The jurisdictions surveyed diverge on whether status conferences are obligatory and on the regular time periods within which they should be held. For example, at the ICTY, ICC, and STL, status conferences are mandatory, although the terms range from 120 days from the initial appearance or from the last status conference (ICTY), to ‘promptly’ after the constitution of the Trial Chamber (ICC), to ‘within a reasonable period’ and not more than eight weeks after the initial appearance or the last status conference (STL).\textsuperscript{736} Relatively uniformly in all tribunals, the status conferences are held before the Trial Chamber or a single judge.\textsuperscript{737} One exception is the STL, where the said conferences are convened by the PTJ, the judge entrusted with the full range of pre-trial judicial tasks, including those exercised in the preparation for trial.\textsuperscript{738} The ICTY, ICTR, ECCC, and STL explicitly allow status conferences (or their analogues) to be conducted with the participation of defence counsel via tele- or video-conference, provided that the accused consents thereto; the \textit{ad hoc} courts furthermore do not even require the personal attendance by the accused and allow him or her to participate via video-conference.\textsuperscript{739}

The second category of conferences and meetings in the tribunals is distinguished by their being a forum for the judges to coordinate the pre-trial work of the parties and taking measures to narrow down the ambit of an evidentiary contest taking place at trial. This includes meetings convened by the PTJ (where available, like in the ICTY and STL) or by the Trial Chamber in order to: (i) identify the issues genuinely in dispute; (ii) facilitate agreements between the parties as a way to reduce of the volume of the evidence that has to be presented at trial; (iii) order submissions from the parties providing an insight into their prospective cases; and (iv) perform substantive managerial measures on the proposed cases, by way of imposing time limits on the case presentation or by ordering the prosecutor to cull the charges. The underlying procedures differ considerably not only between the major procedural models represented in the current system of international criminal justice but also between individual tribunals pertaining to the same model.

The tribunals whose trial proceedings bear a strong adversarial imprint, such as the ICTY, ICTR, SCSL, and the STL, are regimes landmarked the multiple types of conferences geared to implement the specialized trial-preparation tasks. The first type is the co-ordination meetings held in the Chambers before a judge charged with pre-trial tasks. The ICTY, which represents the most elaborate and advanced system of judicial pre-trial preparation, envisages the Rule 65ter meetings convened by the PTJ prior to trial.\textsuperscript{740} That judge is the member and delegate of the Trial Chamber which is to try the case, and the PTJ thus performs under the Chamber’s authority, which includes the obligation to report back to it on various issues within his competence.\textsuperscript{741} These functions include elaborating and overseeing the implementation of the working plan, from deadlines for \textit{inter partes} disclosure to the delivery of the materials to the PTJ, and encouraging the parties to cooperate in scaling the issues in dispute down.\textsuperscript{742} Despite the lack of the formal PTJ function in the ICTR and SCSL, the difference from the ICTY is not as substantial as it might appear. Before those courts, a single judge, normally of the same Chamber, carries out similar functions, including the meetings as may be necessary with the parties. Nonetheless, the pre-trial case-management at the ICTR
and SCSL has apparently been deemed less of a priority and preoccupation than at the ICTY. The formal absence of a function of a judge responsible for coordination with the parties and meetings similar to ICTY Rule 65ter conferences is a consequence of, rather than a reason for, this somewhat lukewarm attitude towards judicial interventionism in the partisan case-preparation as an appropriate and effective method to expedite proceedings.

The STL, whose pre-trial proceedings are conducted by the PTJ, is availed of a set of powers exercised in the context of the ICTY Rule 65ter meetings.\textsuperscript{743} At the STL’s ‘Rule 91 meetings’ the parties to meet to discuss the preparation of the case and may possibly be attended by the victims and the accused.\textsuperscript{744} In contrast with the ICTY’s PTJ, the STL PTJ is not a member of the Trial Chamber that will try the case but an autonomous organ. The STL President expressed optimism that this factor is favourable to having the PTJ actively involved with the evidence during the pre-trial stage, which implies that the PTJ would be more inclined to take substantive decisions towards the reduction of the scope of trials than was the ICTY PTJ. However, this appears to disregard the ICTY experience that the practice of having the PTJ who was not a member of the Chamber trying the case could be the primary reason for the pre-trial Judge’s lack of a pro-active approach and the tendency to defer the decisions which could affect the scope of the case, to the actual trial court. Irrespective of these differences and their practical implications, both the ICTY Rule 65ter and STL Rule 91 meetings have as their purposes the accumulation and submission for the review to the Trial Chamber of comprehensive information on the case by the PTJ.\textsuperscript{745}

The second category of conferences in the tribunals with the ICTY-based model is represented by the managerial conferences during which, or in the aftermath of which, the Trial Chamber renders managerial decisions on the basis of the information about the case supplied by the parties to the Chamber or to the PTJ. Given the division into the case for the prosecution and that for the defence, this refers to the Pre-Trial and Pre-Defence Conference. The former is held prior to the commencement of trial and the latter before the opening of the defence case.\textsuperscript{746} In all tribunals which envisage such meetings (save for the SCSL),\textsuperscript{747} the managerial conferences are conducted by the entire Trial Chamber, even where the considerable part of pre-trial functions is delegated to single (pre-trial) judge, as is the case at the ICTY and STL. Before the ICTY, ICTR, and SCSL, both Pre-Trial and Pre-Defence Conferences are one-time events; it is only at the STL that several such conferences may be held.\textsuperscript{748} Whilst a Pre-Trial Conference is mandatory in all tribunals, there is no formal obligation on the Trial Chamber to hold a Pre-Defence Conference at the ICTY and ICTR.\textsuperscript{749} The purpose of the managerial conferences is determined by the parties’ filing obligations and the scope of judicial powers to manage the cases before trial. Comparative findings in these areas are synthesized in the next paragraph.

By contrast, the tribunals based on the ‘inquisitorial model’ (ECCC) and those whose trial proceedings are subject to skeletal regulation (ICC) do not boast such a variety of pre-trial forms and mechanisms. In part, this is due to the absence of a (formal) division of the case presentation into the case for the prosecution and that for the defence. As mentioned, the ICC status conferences are universal in format and multifunctional in application. Such conferences are used by trial judges both for the co-ordination of trial-preparation by the parties and the exercise of managerial powers in relation to the prospective case(s). Rule 132 of the ICC RPE provides a basis for drawing a distinction between: (i) the first status conference in the case, the purpose of which is to discuss and, possibly, set the date of the

\textsuperscript{743} Rule 91(D)-(E) STL RPE.
\textsuperscript{744} Ibid.
\textsuperscript{745} Rule 65ter (E)-(G) ICTY RPE; Rules 91(G)-(I) and 95 STL RPE.
\textsuperscript{746} Rules 73bis and 73ter ICTY, ICTR, and SCSL RPE; Rules 127 and 129 STL RPE.
\textsuperscript{747} Rules 73bis(A) and 73ter(A) SCSL RPE.
\textsuperscript{748} Rules 73bis(A) and 73ter(A) ICTY, ICTR, and SCSL RPE; Rules 127(A) and 129(A) STL RPE (‘one or more inter partes …conferences’).
\textsuperscript{749} Rule 73ter(A) ICTY and ICTR RPE.
trial, and (ii) any subsequent status conferences, which pursue the objective of conferring with the parties in order to facilitate the fair and expeditious conduct of the proceedings. Thus, the rationale of the subsequent status conferences in the case makes them akin to the ICTY Rule 65ter and STL Rule 91 meetings.

At the stage of trial preparation at the ECCC, trial management meetings are reserved for a similar range of activities.\(^{750}\) The TMM serves not only as a platform for the Chamber to confer with, and allow exchanges between, the parties and to carry out other preparatory measures specified in Rule 79(7) as in case of ICC status conferences and ICTY Rule 65ter meetings. Similarly to the ICTY status conferences, the TMM is also held in order to review the status of the case and to allow the accused to raise health-related issues; such a meeting may be conducted with the participation of counsel via video-conference.\(^{751}\) The Trial Chamber’s decisions on whether or not to call additional evidence as requested by the parties are, however, reserved for the initial hearing, during which the Chamber considers the lists of witnesses and experts submitted by the parties and determines whether calling them would be conducive to the good administration of justice.\(^{752}\) Finally, it must be observed that the SPSC procedural framework did not place much emphasis on case-management. Section 29 of the TRCP merely envisaged a preliminary hearing, which served for the most part as a formal occasion comparable to the initial appearance in the ICTY model-based courts. In particular, at that hearing the court was to ensure that the accused was informed of and understood the charges, that the right to counsel had been respected, and to afford the opportunity to make a statement concerning the charges, including a plea of not guilty or the admission of guilt.\(^{753}\)

There are therefore at least two sets of common standards in the sphere of organizational forms of the preparation for trial shared by all international and hybrid courts (except for the post-WW II International Military Tribunals). One is the duty of the Trial Chamber or its judge, as appropriate, to convene a (status) conference within a specified (and reasonable) period from the date of assigning to it of a case and afterwards to reconvene on a regular basis. The objectives are to organize exchanges between the parties with a view to ensuring expeditious preparation for trial and to review the status of the case by allowing the accused the opportunity to raise issues relevant to his case, including health-related matters. Such conferences are formal but may be conducted with the participation of counsel via tele-conference or video-conference upon leave of the Chamber.

Secondly, all the courts and tribunals under review—except for the IMT and IMTFE—appear to recognize, to varying degrees, the need for judicial supervision over the scope of the case and the quantity of evidence sought to be adduced by the parties during the trial. To that end, the possibility is envisaged for the Trial Chamber (or a designated judge) to hold pre-trial meetings in order to facilitate the cooperation between the parties and the delivery of case materials to the Chamber. Such meetings are the occasions for the Chamber’s exercise of managerial competences in respect of the case, based on the materials it has received from the parties and the designated (pre-trial) judge. The different courts are divided on the specific aspects of organizing this two-pronged process, in particular, whether both functions should be exercised in the same format (e.g. ICC status conferences) or whether different sorts of pre-trial meetings are foreseen (e.g. ICTY Rule 65ter meetings v. Pre-Trial and Pre-Defence Conferences). Where the latter is the case, the existence of separate—and temporally removed—conferences for managing the prosecution and defence cases obviously depends on whether the case presentation consists of one single case or several cases. For example, in the ECCC trial proceedings whereby there is no formal or material distinction between the prosecution and defence cases, there is only one type of a meeting of managerial character—preliminary hearing—that is held before the opening of the trial (substantive hearing).

\(^{750}\) Rule 79(7) ECCC IR.
\(^{751}\) Rule 79(8) ECCC IR.
\(^{752}\) Rule 80bis(2) ECCC IR.
\(^{753}\) Section 29.2 TRCP.
Hence, it can be concluded that a case-management conference held before the commencement of the trial during or in the wake of which the trial judges make essential decisions affecting the scope and length of the trial is the mandatory element and common practice in international criminal justice. Among the tribunals based on the ICTY model, the timing for the filing of the respective materials by the parties is not the same. At the ICTY, the pre-trial and pre-defence filings must be filed well in advance of the respective conferences, whereas the same does not follow from the Rules of the ICTR and SCSL (even if the practice may have varied). At the ICTR and SCSL, the filings are to be made ‘before the date set for trial’. The fact that the Trial Chambers of the tribunals will be in possession of the required materials at different points in time cannot be without consequences for the actual functions the Pre-Trial and Pre-Defence Conferences serve and, ultimately, for the rigorosity of the judicial intervention and institutional efficiency.

Finally, the third type of pre-trial meetings is exemplified by the ICTY Rule 65ter meetings, ECCC TMMs, and STL Rule 91 meetings. Such informal and household meetings are convened for the purpose of co-ordination of the pre-trial work by the parties and garnering the information about the projected scope and length of the forthcoming case. This form of pre-trial work is practiced in most contemporary tribunals. Although analogous meetings are not explicitly provided for in the ICTR, SCSL, and ICC, their procedural regimes include analogous functions which are brought under other existing organizational forms (e.g. status conferences). The further split exists with respect to two aspects of such preparatory meetings, both of which relate to the competent authority. In all tribunals except for the STL, this pre-trial work was carried out by the Trial Chamber itself or by the pre-trial (designated) judge of the same Chamber who reports to the Chamber. Secondly, exceptionally at the ICTY, the pre-trial Judge may be helped in the exercise of these coordination functions by the Senior Legal Officer of the Chamber. The same solution was deliberately rejected at the SCSL and, later on, at the STL.

3.7.2 Pre-trial (and pre-defence) filing duties

Except for the post-WW II tribunals and the SPSC, the procedural regimes of all courts surveyed provide for the power of the Trial Chamber to order the parties (and participants, where appropriate) to file the detailed information on (their) case(s). There is certainly a common ground that can be discerned as to the kind and volume of the materials the parties may be required to file with the Chamber, subject to nuances as to the expected level of detail. But the picture is quite diverse on the issue of which actors are required to make filings and at which stage in the proceeding.

In the tribunals where the presentation of the case is structured per party, the delivery of the materials to the Trial Chamber proceeds in two steps. As a matter of law, both parties shall make their first filings to the Trial Chamber before the Pre-Trial Conference (ICTY and STL) or before the date set for trial (ICTR, SCSL). The prosecutor shall file: (i) the pre-trial brief addressing legal and factual issues and including, or accompanied by, for each count, the summary of evidence, admissions by the parties and statement of facts not in dispute; (ii) a list of witnesses the prosecutor intends to call, including the particulars of each witness, the summary of facts, the relevant points in the indictment, and the expected length of each testimony; and (iii) the list of exhibits, including information on the defence’s objections to authenticity. Whilst the ICTR and SCSL RPE expand this list by copies of written statements of each witness, the ICTY and STL Rules empower PTJ to require even more detailed filings with respect to the proposed witness testimonies, such as the total number of

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754 Rule 65ter (E)-(G) ICTY RPE; Rules 73bis(B) and 73ter(B) ICTR and SCSL RPE; Regulation 54 Regulations of the Court (ICC); Rule 80(1)-(3) ECCC IR; Rules 91(G)-(I) and 128 STL RPE.

755 Rule 65ter(E) ICTY RPE; Rule 73bis(B) ICTR and SCSL RPE; Rule 91(G) STL RPE.
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witnesses and the number of witnesses to testify against each accused on each count, the manner of proposed testimony, and the total time estimated for the presentation of the prosecution case.\(^\text{756}\) In the ICTY practice, the Trial Chambers have had access to the written witness statements too, even despite the absence of an explicit authorization to that effect in the RPE.

Being essentially an early response to the prosecutor’s materials, the defence’s filings must be filed before the Pre-Trial Conference (ICTY and STL) or before the date set for trial (ICTR and SCSL). The defence pre-trial materials are of a more limited nature and consist of:

(i) a pre-trial brief exposing in general terms the nature of the defence case, the matters with which the accused takes issues in the prosecutor’s brief and the reasons for disagreement.\(^\text{757}\)

Furthermore, the STL PTJ shall order the participating victims to file, before the Pre-Trial Conference, their lists of proposed witnesses and exhibits.\(^\text{758}\) The second installment of filings follows after the close of the prosecution evidence, when the defence is expected to submit more detailed information about its proposed evidence to the Trial Chamber or judge before the commencement of its case. This includes the admissions and statement of matters (not) in dispute, a list of witnesses and exhibits with particulars analogous to those required from the prosecution.\(^\text{759}\) Once again, the required level of detail in the defence’s subsequent filings is higher at the ICTY and STL,\(^\text{760}\) although the ICTR and SCSL Rules expressly empower the judges to order the defence to provide them with the copies of written witness statements.\(^\text{761}\)

In the courts endowed with the case-presentation scheme that is amorphous and/or hybrid (ICC) or leans towards the ‘inquisitorial’ model (ECCC), the delivery of the materials to the Trial Chamber may be ordered but it is not structured in a way reflecting the bifurcation of cases. At the ECCC, the parties’ submissions are not made in two stages as to mirror the two distinct blocks of evidence per party, given that it is a single case that is to be probed in court, while at the ICC the issue is not subject to express regulation.\(^\text{762}\) ICC Regulation 54 provides for the power of the Trial Chamber to issue orders, at a status conference, on a broad array of issues, many of which relate to the quantum of proof sought to be adduced at trial and, consequently, the length of trial. Although the power to order submissions at a status conference is not explicitly provided for, the principle of consultation envisaged in Rule 132(2), in combination with the case-managerial powers under Regulation 54, implies that the ICC Trial Chamber the power to order such filings from the parties. The non-exhaustive list in the said Regulation implies, inter alia, the authority of the Chamber to require the parties to submit to it, before the commencement of the trial, the detailed information on the case, including: the expected length and content of legal arguments, opening and closing statements, a summary of evidence to be relied upon, the summary of that evidence and its length, including the proposed length of questioning of the witnesses, the number and identity of the witnesses, the manner of testimony and the statements of the witnesses as well as the defences, if any, to be advanced by the accused. Regulation 54 covers fully and potentially goes even further than the scope of the parties’ filings that may be ordered by the Trial Chambers of other courts.

Similarly, the parties’ filings to the ECCC Trial Chamber are synchronized, i.e. not spread over the different phases of trial. This flows from the organization of the case presentation not per party but per topic. The Co-Prosecutors are under an obligation to submit a list of witnesses and experts they intend to summon, to which the accused and civil parties may add witnesses and experts they wish to call after notification of the Co-Prosecutors’

\(^{756}\) Rule 65ter(E)(ii) ICTY RPE; Rule 91(G)(ii) STL RPE.

\(^{757}\) Rule 65ter(F) ICTY RPE; Rule 73bis(F) ICTR and SCSL RPE; Rule 91(I) STL RPE.

\(^{758}\) Rule 91(H) STL RPE.

\(^{759}\) Rule 65ter(G) ICTY RPE; Rule 73ter(B) ICTR and SCSL RPE; Rule 128 STL RPE.

\(^{760}\) Rule 65ter(G)(i) ICTY RPE; Rule 128(i) STL RPE.

\(^{761}\) Rule 73ter(B) ICTR and SCSL RPE.

\(^{762}\) Rules 80(1)-(3) ECCC IR; Regulation 54 Regulations of the Court (ICC).
In addition, the Trial Chamber may order the parties to file, before the initial hearing, the more detailed information regarding the witnesses, i.e. a sufficiently detailed summary of the facts for each witness and the estimated length of the testimony, as well as a list of exhibits, an indication of the legal issues to be raised at the initial hearing, a list of new documents proposed for admission with a brief description of their contents, and a list of uncontested facts with reference to the relevant evidence. The volume of materials to be delivered to the ECCC Trial Chamber is comparable to the same in the context of other courts. As an ‘inquisitorial’ court, the ECCC Trial Chamber should have an insight into, and understanding of the case that is amply sufficient to enable it to effectively exercise its managerial powers at the initial hearing.

These comparative findings point to the emergence of common standards to the effect that the Trial Chamber shall have an *ex ante* access to the detailed information about the case to be presented by the parties during the trial and that it shall gain such access by ordering the parties to file the necessary information in advance. The nature and volume of the materials to be filed with the Chamber are relatively uniform in all tribunals. The items to be filed include pre-trial briefs elaborating on factual and legal matters, both contested and in dispute as well as giving insight, to the extent possible, into the parties’ proposed evidence; witness lists with full details on the proposed witnesses and their testimony as well as exhibits lists with relevant particulars. Where the tribunals diverge is the symmetry of such submissions at different stages of trials and the filing duties that may be imposed on the participating victims. But this divergence results from systemic differences between the courts (such as the uniform/binary structure of case presentation and the allowance/non-availability of victim participation) – not from the normative disagreement on whether such filing may legitimately be ordered by a court in order to exercise its managerial powers, which are turned to next.

### 3.7.3 Judicial managerial powers

The third area of the pre-trial practice where common standards as well as material differences can be discerned, is the exercise by the Trial Chambers of managerial powers with regard to the evidence as proposed by the parties. This aspect is the core of trial-preparation stage, given that pre-trial meetings and filing duties of the parties are merely a prelude to enabling the Chamber perform case-management functions in ensuring that the necessary evidence (and only such evidence) forms part of the case to be tried. Generally, the jurisdictions in issue are aligned as far as the nature and ambit of judicial powers are concerned.

The powers to call upon the prosecutor and the defence (ICTY and STL) or to order them (ICTR and SCSL) to shorten the estimated length of the examination-in-chief of some witnesses, is paralleled by the powers of the ICC Trial Chamber to rule on the admissible quantity of evidence and the length of questioning of witnesses at the status conference. The power to determine the estimated length of the examination of witnesses before a substantive hearing is vested in the ECCC Trial Chamber, which obtains the parties’ information on these issues prior to the initial hearing. In the ECCC, the relevance of time limits on the estimated duration of examination in advance may be limited, due to the fact that it is normally the ECCC Trial Chamber that conducts the bulk of questioning and, so in doing, it is guided by the duty to ask all questions deemed relevant to ascertaining the truth.

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763 Rule 80(1) and (2) ECCC IR.
764 Rule 80bis(2) ECCC IR.
765 Rules 73bis(B) and 73ter(B) ICTY RPE; Rules 73bis(C) and 73ter(C) ICTR and SCSL RPE; Rules 127(C) and 129(C) STL RPE.
766 Regulation 54(c) and (d) Regulations of the Court.
767 Rule 80(3)(a)(iii) ECCC IR.
Secondly, the Trial Chambers are empowered to determine the number of witnesses for each party (ICTY, STL), to order either party to reduce the number of witnesses (ICTR, SCSL), or to rule on the number of witnesses to be called (ICC). Similarly, the ECCC Trial Chamber determines the number of witnesses at the initial hearing, when considering the lists of potential witnesses and experts proposed by the parties. As noted, it may reject a request to call a witness if hearing that witness would not be conducive to the good administration of justice. Furthermore, the specific power to determine the time available to each of the party for the presentation of evidence is given to the Trial Chambers at the ICTY and the STL. The same power inheres in the case-management role of the ICC Trial Chambers, even though the non-exhaustive Regulation 54 does not mention it among competences to be exercised at the status conference. Somewhat differently, such a formal power not be instrumental for the ECCC given the absence of the bifurcation into two partisan cases and the dominating role of trial judges in examining witnesses and experts.

Thirdly, the judicial powers to apply ‘surgical measures’ on the prosecution case by inviting or ordering the prosecution to reduce the scope of charges are clearly unique to the ICTY. In particular, the ICTY Trial Chambers may limit the prosecution case: (i) by requesting the reduction of the incidents and crime sites comprised with the charges to those that are most representative; (ii) by inviting the prosecutor to reduce the number of counts in the indictment; and (iii) if necessary, by directing him or her to select the counts in the indictment on which to proceed. Given that no other international or hybrid court’s procedural framework allows the trial bench to interfere as extensively with the prosecutor’s power to formulate charges and to present supporting evidence, this managerial device should be regarded as fairly exceptional, being perhaps justified by the circumstances of the ICTY rather than by its status as a mainstream and widely accepted standard or practice in international criminal procedure.

Fourthly and finally, the parties at the ICTY, ICTR, and SCSL are expressly entitled, during the trial, to request the Chamber to vary its earlier decisions limiting the number of witnesses or to reinstate the list of witnesses to be called, and the Chamber may grant such requests in the interests of justice. Moreover, the ICTY Trial Chamber may, upon the request of the prosecutor, to vary a decision as to the number of crime sites or incidents in respect of which evidence may be presented, as well as to grant requests of the parties for additional time to present their evidence. The powers to vary earlier determinations of the number of witnesses are not expressly provided for in the ICC, ECCC and STL, but can be deemed in be inherent in the Trial Chambers’ competence to control the trial proceedings before them.

4. ASSESSMENT

4.1 Fairness perspective

4.1.1 Forms of trial preparation

Like in many other areas of criminal process, the human rights law and jurisprudence of the regional human rights courts provide no specific guidance on the proper way of organizing

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768 Rules 73bis(C)(i) and 73ter(C)(i) ICTY RPE; Rules 73bis(D) and 73te (D) ICTR and SCSL RPE; Regulation 54(c) Regulations of the Court (ICC); Rules 127(C)(ii) and 129(C)(ii) STL RPE.
769 Rule 80bis(2) ECCC IR.
770 Rules 73bis(C)(i) and 73ter(C)(i) ICTY RPE; Rules 127(C)(i) and 129(C)(i) STL RPE.
771 Rule 73bis(D) and (E) ICTY RPE.
772 Rule 73bis(D) and 73ter(D) ICTY RPE; Rules 73bis(E) and 73ter (E) ICTR and SCSL RPE.
773 Rule 73bis(F) and 73ter(F) ICTY RPE.
774 Regulation 54 (chapeau) and (e) Regulations of the Court (ICC); Rules 127(B) and 129(B) STL RPE.
the preparatory stage of criminal trials. As noted with respect of the ECtHR’s case law, it is not conclusive on whether the criminal process must be structured as a partisan contest or official inquest and does not prescribe whether the control over the evidence at trial should remain with the parties or with the trial court. A procedural model in which judges operate as case-managers before trial would is not per se inconsistent with the Convention. But human rights standards and their interpretations may be indirectly relevant to the topic in question. In particular, the determination of whether the legislative solutions and reforms at the international and hybrid courts are fair is informed by the assessment whether the purport of those reforms and specific solutions—ensuring the more streamlined trials through the tighter judicial control over the preparation of the cases during the pre-trial—comply with the fair trial requirement and minimum guarantees.

Thus, the evaluation of the constituent elements and forms of case management practices in international and hybrid criminal courts from the perspective of fairness should take into account the main purpose of introducing the respective measures. The reforms pioneered by the ICTY and ICTR—and inherited subsequently as ready-made solutions by the jurisdictions which were created more recently—were first and foremost intended to prevent or shorten delays in preparing the cases for trial and to reduce the length of the trial process by avoiding the presentation of cumulative and superfluous evidence, including that on uncontested matters. The aspiration to reduce the duration of trial-preparation and trial process was closely related to the need to ensure that the accused persons do not remain in detention for lengthy periods of time while awaiting the outcome in their case. The core rationale of managerial judging reforms is consistent with the spirit of the right to be tried without undue delay for those reforms sought to expedite the proceedings.

The test for the reasonableness of the length of the proceedings developed and applied by the ECtHR in multiple cases is that the case must be assessed according to its individual circumstances and in light of the following criteria: (i) the complexity of the case; (ii) the conduct of the applicant; (iii) the conduct of the relevant authorities; and (iv) what was at stake for the applicant in the dispute. The conduct of the authorities is a decisive factor in its case law. Under this prong, the Court looks into whether there were any unexplainable delays or periods of inactivity on the part of the authorities. The justifications invoked by the governments, such as that the reason for procedural delays was that the prosecuting and/or judicial authorities had to deal with excessive caseloads were consistently rejected by the Court. In several (civil) cases in which the inadequacy of case management mechanisms was alleged by the applicant, the Court reaffirmed that the relevant State remains responsible

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776 Art. 6(1) ECHR (‘In the determination … of any criminal charge against him, everyone is entitled to a … hearing within a reasonable time’); Art. 14(3) ICCPR (‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … To be tried without undue delay’); Art. 8 (1) ACHR (‘Every person has the right to a hearing … within a reasonable time’).
778 Trechsel, Human Rights in Criminal Proceedings (n 391), at 142 and 146.
779 Bagetta v. Italy, Judgment, Application no. 10256/83, ECtHR, 25 June 1987, para. 23 (‘the Convention places the Contracting States under a duty to organise their legal systems so as to enable the courts to comply with the requirements of Art. 6 § 1, including that of trial within a “reasonable trial”: nonetheless, a temporary backlog of business does not involve liability … provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind.’); Eckle v. Germany (n 777), para. 92; Milasi v. Italy, Judgment, Application no. 10527/83, ECtHR, 25 June 1987, para. 18; Abdoella v. Netherlands, Judgment, Application no. 12728/87, ECtHR, 25 November 1992, para. 24; Pélisser and Sassi v. France, Judgment (n 777), para. 74.
for the efficiency of the system and that ‘the manner in which it provides for mechanisms to comply with the reasonable time requirement – whether by automatic time-limits and directions or some other method – is for it to decide’. In case the proceedings span beyond the ‘reasonable time’ period prescribed in Article 6 and the State does not undertake measures to advance them, the responsibility for the resulting delay lies with the State. Such a failure will result in a finding of a violation of the right to a fair trial under Article 6(1) of the ECHR. The principle of attributing responsibility for inexcusable delays to the State may be considered as an implicit encouragement by the Court for the member states to adopt the measures enabling them to process cases more efficiently, if not as an express approval of the managerial model.

One objection to the managerial system may be raised in light of a tension it seems to create with an adversarial character of the proceedings for it may result in a reduced party control over the presentation of evidence. In the ECHR regime, the principle of adversarial hearing is a fundamental aspect of the right to a fair trial. The ECtHR defined the right to an adversarial trial in the context of criminal proceedings as the right to be heard which guarantees ‘both prosecution and defence … the opportunity to have knowledge of and comment on the observations filed and evidence adduced by the other party’. However, the managerial model and the reduced party control, combined with the increased judicial powers exercised to make the proceedings more expeditious, per se does not violate the right to an adversarial trial. The closer judicial control over the preparation of the case and the dilution of the party-driven character of the pre-trial process does not mean that the right to an adversarial hearing is compromised. On the contrary, the forms of pre-trial process in the international and hybrid criminal tribunals are aimed to facilitate the communication between the parties and to provide them with additional opportunities to be heard by the pre-trial judge or the Chamber from the early stages of the proceedings. Arguably, the rigorous and proactive case-management by the bench and more intensive pre-trial interaction between the parties does not undermine the right to an adversarial hearing. Among others, it serves to identify issues which are not truly in dispute between the parties so that evidence is not led unnecessarily, as well to preclude the ‘trial by ambush’ tactics at trial. Nor does the managerial model encroach upon the principle of equality of arms as part of the right to a fair trial, provided that the exercise of the respective judicial powers affords either party a reasonable opportunity to present its case under conditions that do not put it at a disadvantage in relation to the opponent.

Some of the forms of preparation for trial employed by international and hybrid criminal courts may raise human rights issues. Thus, the ICTY and STL pre-trial meetings are held in the Chambers before the pre-trial judge (or a SLO) in order to facilitate the communication between the parties on matters in dispute and to identify uncontested issues. Such activities conducted on behalf of the Trial Chamber could be perceived as an attempt to force an agreement onto the parties or as compelling the accused to admit incriminating facts. In this sense, a question may arise of the tensions between this practice and the privilege against self-

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782 Trechsel, Human Rights in Criminal Proceedings (n 391), at 89.

783 Laukkanen and Manninen v. Finland, Judgment, Application no. 50230/99, ECtHR, 3 February 2004, para. 34; Rowe and Davis v. UK, Judgment, Application no. 28901/95, Grand Chamber, ECtHR, 16 February 2000, para. 60; Brandstetter v. Austria, Judgment, Applications nos. 11170/84; 12876/87; 13468/87, ECtHR, 28 August 1991, paras 66-7; Barberà, Messegué and Jabardo, Judgment, Applications nos. 10590/83, ECtHR, 6 December 1988, para. 78; Kamasinski v. Austria, Judgment, Application no. 9783/82, ECtHR, 19 December 1989, para. 102.
incrimination. However, it goes without saying that the accused is entitled not to cooperate in the prosecution effort and with the managerial court and may be expected neither to agree to facts nor to waive the right to contest allegations against him or her.

Indeed, such an expectation would be antithetical to the right of the accused not to confess guilt, which is an absolute guarantee in all international criminal tribunals. Provided that the ICTY Rule 65ter meetings and analogous procedure is used properly, i.e. to clarify the contested areas of fact and law to enable the court to provide a workable and efficient schedule for the presentation of evidence, the risk of the violation of the privilege is theoretical. Under the managerial judging model, it is inconceivable that the accused will be prodded or compelled to acknowledge facts that he would otherwise have contested, or that he would feel induced to confess guilt. If such undue pressure occurs, this would be a flagrant violation not only of the ‘external’ human rights standards, including the ECtHR, but also of the tribunals own procedural law. That said, the judges and their staff responsible for the conduct of pre-trial proceedings must be alert not to trespass into the domain of suggesting the defence that they ought to acknowledge certain facts, rather than merely inquiring whether an agreement is possible.

Another possible issue relates to the fact that, except for the STL, the pre-trial (or designated) judge responsible for the pre-trial work with the parties is the member of the Trial Chamber that tries the case. This entails that at least some members of the Trial Chamber or even the entire Chamber (as is the case at the ECCC) will be intimately familiar with the evidence that will presented and examined during the hearing. The question in this connection is whether prior knowledge of the case and of evidence may affect the impartial nature of the tribunal and whether the right to be tried by an impartial court may be infringed.

The Human Rights Committee defined the impartiality of the court thus: ‘judges must not harbour preconceptions about the matter put before them, and … they must not act in ways that promote the interests of one of the parties’. The European Court’s case law provides a two-pronged test for assessing the impartiality of the tribunal under Article 6(1) of the ECHR: the subjective test (addressing a personal conviction of a particular judge in a given case) and the objective test (ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect).

Interestingly, the adoption of a largely adversarial approach towards the judicial role at the dawn of the ICTY’s lifetime was explained by the aspiration to ensure the impartiality of the judges. To some degree, this mirrored the existing concern within national jurisdictions.

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784 Funke v. France, Judgment, Application no. 10828/84, ECtHR, 25 February 1993, para. 44 (finding a violation of ‘the right of anyone “charged with a criminal offense”, within the autonomous meaning of this expression in Art. 6 (art. 6), to remain silent and not to contribute to incriminating himself’); Saunders v. UK, Judgment, Application No. 19187/91, ECtHR, 17 December 1996, para. 68 (‘although not specifically mentioned in Art. 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Art. 6’); John Murray v. UK, Judgment, Application No. 18731/91, ECtHR, 8 February 1996, para. 45; Serves v. France, Judgment, Application No. 20225/92, ECtHR, 20 October 1997, para. 46; Quinn v. Ireland, Judgment, Application No. 36887/97, ECtHR, 21 December 2000, para. 40; Allan v. UK, Judgment, Application No. 48539/99, ECtHR, 5 November 2002, para. 44.

785 Article 6(1) ECHR (‘everyone is entitled to a … hearing … by an independent and impartial tribunal established by law’); Art. 14(1) ICCPR (‘everyone shall be entitled to a … hearing by a competent, independent and impartial tribunal established by law’); Art. 8(1) ACHR (‘Every person has the right to a hearing … by a competent, independent, and impartial tribunal, previously established by law’).


788 Statement by the President Made at a Briefing to Members of Diplomatic Missions, Summary of the Rules of Procedure at the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/29 (President Cassese
that the pre-trial access to evidence might influence the deliberations of guilt and taint the impartiality of judges.\textsuperscript{789} When addressing the relationship between the impartiality of the court and familiarity with the evidence in the case, the ECtHR held that the latter does not \textit{per se} preclude impartiality.\textsuperscript{790} In addressing the applicants’ fear of the judges’ lack of impartiality due to the prior involvement in the case in some capacity, the European Court distinguished between the decisions that are made during the pre-trial phase (for example, release on remand) and those on the merits of the case; the difference in their nature of the decisions was regarded as indicating the absence of (objective) bias.\textsuperscript{791} This is to be distinguished from scenarios in which a judge was previously a responsible member of the public prosecutor’s department – as the ECtHR held this circumstance to be capable of undermining the public appearance of impartiality.\textsuperscript{792}

The application of this rationale by analogy to the issue of the involvement of the pre-trial judge in the trial bench adjudicating on the guilt or innocence of the accused, may suggest that is does not \textit{per se} undermine the court’s impartiality, insofar as a distinction is upheld between the managerial activities in the pre-trial stage and the function of the assessment of evidence, which must be reserved for trial on the merits. The importance of this distinction is reinforced by the language adopted by the ECtHR in several of its judgments, referring to the judge’s involvement in the preparation of the case and in the assessment of evidence during pre-trial stage as possible examples of scenarios in which the impartiality of the court might be at stake.\textsuperscript{793} Comparing this with the \textit{Piersack v. Belgium} scenario, it is hard to argue that pre-trial exposure by a judge to the prosecution (summary) evidence strips that judge of the ‘objective’ aspect of impartiality by virtue of his or her involvement with the prosecution.\textsuperscript{794} It must be considered that such exposure is allowed for the limited purpose of ensuring the manageability of that case at trial and that the defence may present its general lines of defence in the pre-trial brief. Thus, a successful claim of a violation of the right to an

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explaining the judges’ choice of the adversarial style by the need for the judges ‘to remain as impartial as possible’.
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\textsuperscript{790} \textit{Morel v. France} judgment (n 787), para. 45 (‘the mere fact that the a judge has already taken pre-trial decisions cannot by itself be regarded as justifying concerns about his impartiality. What matters is the scope and nature of the measures taken by the judge before the trial. Likewise, the fact that the judge has detailed knowledge of the case file does not entail any prejudice on his part that would prevent his being regarded as impartial when the decision on the merits is taken. Nor does a preliminary analysis of the available information mean that the final analysis has been prejudiced. What is important is for that analysis to be carried out when judgment is delivered and to be based on the evidence produced and argument heard at the hearing’); \textit{Saraiva de Carvalho v. Portugal} judgment (n 787), para. 35; \textit{Hauschildt v. Denmark}, Judgment, Application no. 10486/83, ECtHR, 24 May 1989, para. 50; \textit{Nortier v. the Netherlands}, Judgment, Application No. 13924/88, ECtHR, 24 August 1993, para. 33.

\textsuperscript{791} \textit{Hauschildt v. Denmark} judgment (n 790), para. 50.

\textsuperscript{792} \textit{Piersack v. Belgium}, Judgment, Application No. 8692/79, ECtHR, 1 October 1982, paras 30-31 (’the mere fact that a judge was once a member of the public prosecutor’s department is not a reason for fearing that he lacks impartiality, … Even when clarified in the manner just mentioned, a criterion of this kind does not fully meet the requirements of Art. 6 § 1 (art. 6-1). In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation.’).

\textsuperscript{793} \textit{Bulut v. Austria} judgment (n 390), para. 34 (’it has not been suggested that Judge Schaumburger was responsible for preparing the case for trial or for deciding whether the accused should be brought to trial. … His role was limited in time and consisted of questioning two witnesses. It did not entail any assessment of the evidence by him nor did it require him to reach any kind of conclusion as to the applicant’s involvement.’); \textit{Hauschildt v. Denmark} judgment (n 790), para. 50 (’The judge’s functions on the exercise of which the applicant’s fear of lack of impartiality is based, and which relate to the pre-trial stage, are those of an independent judge who is not responsible for preparing the case for trial or deciding whether the accused should be brought to trial.’).

\textsuperscript{794} See supra n 792.
impartial tribunal should rest on more than an abstract reference to the fact that a judge had a preview of the prosecution case in the form of witness and exhibit lists and, possibly, witness summaries.

The principal rationale of the pre-trial case management in international criminal law is to streamline the trial proceedings through defining issues genuinely in dispute and determining what evidence should be presented at trial, rather than to anticipate any future determinations on the merits of that evidence. It is uncertain whether in the exercise of managerial measures it is in all cases possible to ensure that preliminary assessments of the evidence and the parties’ cases that might affect the subjective aspect as well as objective perceptions of the judge’s impartiality. Thus, while the ECtHR case law refrains from adopting a clear normative stand as to the admissibility, from a human rights perspective, of the participation in the trial of a judge who was previously tasked with the pre-trial work, it appears to reflect a certain suspicion—not expressly articulated though—as regards such a judge’s ‘objective impartiality’.

4.1.2 Filing duties

The presumption of innocence, along with its derivative right not to confess guilt and not to have the burden of proof reversed, are vantage points in a human-rights assessment of the power of the PTJ or the Trial Chamber to order the parties to make filings containing extensive and detailed information on their respective cases. From this perspective, the requirement that the defence furnish the court with a pre-trial brief outlining the nature of the defence case, the disputed matters and the reasons for disagreement, prior to the trial—and, therefore, before the prosecutor presents his case—is on the face of it in tension with the tenet that it is the prosecutor who must bear the burden of proving the guilt. In tribunals with the binary structure of case presentation, the defence is placed under the duty to comply with judicial orders to file pre-trial brief before trial, as well as lists of witnesses and exhibits prior to the opening of the defence case. At the ICTY, this duty is reinforced by the possibility of applying procedural sanctions against a recalcitrant party, which can be as severe as the exclusion of the relevant evidence. In the sense that there is an expectation that the defence will put some of its cards on the table early in the game, the requirement of the delivery of the materials is liable to the criticism that it prods the accused to cooperate towards his own conviction. If that is the case, the right to remain silence without this being a ground to draw adverse inferences may be seen as illusory.

While the operation of this aspect of the managerial model may be not completely unproblematic, it is also possible to interpret the filing duties of the defence in the way not inconsistent with the presumption of innocence. Such an interpretation centers on the rationale of such submissions being different from requiring the accused to rebut incriminating evidence. The defence is not ordered to furnish the Chamber with the evidence substantiating the possible argument that the accused is innocent or otherwise mitigating information. While such a duty would arguably be in violation of the right to remain silent, it is not the gist of the delivery requirement, because the prosecution evidence that may be rebutted is not presented before the commencement of the trial. There is an important distinction between the evidence and summary information about the case. Thus, the defence’s filing duties concern the submission of the information on its general strategy at trial and the nature of the case that would enable the Chamber to effectively manage the case as the means of securing the right to be tried without undue delay to the accused. The examination and evaluation of the evidence may not take place before trial, and judges may not—and cannot—use the untested and generalized partisan information to decide the case on the merits. If it were otherwise, there would be no need to hold a trial, and the judgment on the merits could be made already...

795 Rule 65ter(N) ICTY RPE.
on the basis of pre-trial briefs and the bundles of case materials provided by the parties. This is obviously not how it is supposed to work in the international criminal jurisdictions. This concern and the response to it serve to underscore the importance that of the trial bench and individual judges refraining from drawing inferences from the parties’ pre-trial submissions – or, for that purpose, from the insufficiency of defence submissions. Adjudication may not proceed *de facto* on the basis of pre-trial materials filed for the purpose of case-management and such materials cannot be used for any other purpose.

The second issue in connection with the pre-trial filings of the parties concerns judicial impartiality. The expanding role of international criminal judges in the pre-trial context invites an objection that judicial access to prejudicial information outside of the trial framework is inconsistent with the right to an impartial tribunal. Thus, Megan Fairlie expressed preoccupation that pre-trial access to such information may affect the neutrality of the ICTY judges and is ‘disconcerting with regard to the *tabula rasa* judicial approach in the adversarial proceedings’.  

Whilst the first version of Rule 15(C) of the ICTY RPE on disqualification of judges specifically precluded a judge who had reviewed an indictment against the accused to sit on the trial bench assigned to try the same case, this Rule was amended in 1999 to provide the contrary. This reflects the conception of impartiality shifting the position that confirmation is an activity that compromises or rules out judicial impartiality to its exact opposite. Likewise, no rule ever existed or was introduced to make the pre-trial work with the parties a ground for disqualification, which means that the ICTY procedural system treats it as compatible with impartiality. Moreover, the same author seems to be generally opposed to allowing a member of the Trial Chamber assigned to try the case, such as the ICTY’s PTJ, to have an unrestrained access to the case information in the pre-trial, for the reason that the epistemic advantages that judge holds as a result of his acquired familiarity with the materials in the case, undermines the collegiality of the decision-making in international criminal law.

Related concern raised in this context attacks the pre-trial access to would-be evidence in the tribunals with a binary structure of case presentation, as the volume and degree of detail of the materials to be filed by each party prior to trial are asymmetrical. Commentators have argued that, in contrast to a civil-law dossier, the file submitted to the Trial Chamber by the ICTY PTJ is not neutral but represents largely a prosecutorial vision of the adjudicated events. It is true that, prior to the commencement of the trial, the Trial Chamber’s exposure to incriminating materials is more substantial than to the exculpatory materials, given that the defence’s pre-trial brief will in the majority of cases be concise and advance nothing more than generalized rejections of the accusations and incriminating facts.

However, this concern arguably over-dramatizes the risk of tainting judicial impartiality as it does not duly consider the structural and institutional safeguards in place. It would be difficult to maintain, as well as to identify authorities within the ECtHR case law, that such as asymmetry is caught by the human rights interpretation of an ‘impartial tribunal’. Although it is not a failproof guarantee in all circumstances, regard must be had to the professional character of the international bench, which, it must be assumed, is capable of distinguishing between the materials submitted for the purpose of case management, on the one hand, and the evidence on the other. Moreover, should the defence wish to present exculpatory evidence, it may file its (tentative) lists of witnesses and experts before the presentation of its

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796 Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 11), at 279-80 (e.g. ‘Preventing pre-trial access to case information by the trier of fact, consistent with the adversarial approach, would serve to support a bond between the approach and judicial impartiality’) and 302.

797 Rule 15(C) ICTY RPE (IT/32/Rev. 17, 17 November 1999).

798 See text accompanying infra n 823.

799 Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 11), at 309 (‘the case file provided to the Trial Chamber is by no means comparable to the results of an impartial investigation; rather, it contains partisan submissions, and its contents, at best, are heavily lopsided in favor of the prosecution.’).

case, which may have a neutralizing effect on the (perceived) initial prosecutorial prevalence. 801

4.1.3 Judicial managerial powers

The exercise of substantive managerial powers, such as reducing the number of witnesses or determining the time available for the examination of witnesses and the total time to be taken up in the presentation of evidence, clearly has an impact on the opportunity each party has to be heard and to have a reasonable opportunity to present its case. Therefore, it might impinge on the right of the accused to an adversarial hearing, which was addressed earlier. It bears observing, however, that case-management orders issued with a view to confining the volume of litigation at trial could impermissibly restrict the right to an adversarial hearing taken without proper consultation with a relevant party. Unilateral decisions by the Trial Chamber are neither a regular nor admissible managerial practice in any of the courts surveyed. The procedural frameworks of the tribunals embody the principle of consultation, which entails the duty on the PTJ or the Chamber to consult with the parties extensively before requesting reductions of the estimated length of the case presentation or the number of witnesses. Moreover, the Trial Chambers may be moved by the relevant party ex post facto for the variation of a previous decision limiting the number of witnesses and the allotted time for the examination-in-chief. The existence and use of the judicial power to control the length of the trial through limiting the quantum of evidence does not automatically compromise the right to an adversarial argument. If exercised in a balanced manner, the power allows focusing the adversarial debate on the factual and legal issues that are relevant for the decision and making it more effective for the purpose of determining the truth regarding the charges.

Furthermore, pre-trial case management by the judges shapes the trial in terms of how many witnesses the parties may call. This potentially engages the right of the accused ‘to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him’. 802 The requirement of the ‘same conditions’, also known as the equality of arms principle, between the prosecution and the defence, demands the court to ensure that ‘each party be afforded a reasonable opportunity to present its case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’. 803 As noted, the principle poses no objection to the fair, proportionate, and balanced moderation by the trial court of the scope of the case, provided that no party is handicapped in the effective presentation of its case as a result of the limitations imposed by the managerial court on its projected case.

4.2 Teleological perspective: Institutional goals

The contributions by the international criminal tribunals to the achievement of the grand objectives the framers had in mind when establishing them are measured to a considerable extent by their ability to process cases fairly and expeditiously. Unreasonable delays in the implementation of the adjudicative mandate carry a serious risk of depriving the accused of the right to a fair trial, denying timely justice to the victims and the afflicted communities, and

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801 Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 11), at 309, note 386 (reluctantly acknowledging this argument).
802 Art. 6(3)(d) ECHR. See also Art. 14(3)(f) ICCPR; Art. 8(2)(f) ACHR.
803 Bulut v. Austria judgment (n 390), para. 47. Cf. Dombo Beheer B.V. v. Netherlands, Judgment, Application No. 14448/88, ECtHR, 27 October 1993, para. 33 (‘the requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to such cases as well as to criminal cases’; ‘as regards litigation involving opposing private interests, “equality of arms” implies that each party must be afforded a reasonable opportunity to present its case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.’).
the perception of institutional inefficiency by the stakeholders of international criminal justice. The criminal justice that is delayed and inefficient will more likely be counterproductive as an instrument for the promotion of reconciliation and political and social stability in post-conflict societies.

As the foregoing sections have shown, the managerial judging model, pioneered by the ad hoc tribunals in anticipation of the pressures of the completion strategy and inherited by the newer courts, endowed the judges with the tools for addressing delays caused by the essentially party-driven process. It allowed them, to varying degrees, to counteract ‘adversarial excesses’ which could impair the procedural fairness and expeditiousness. Langer has convincingly argued that, as a ‘mutation’ of the adversarial style, this model was the most logical course of procedural evolution in the ad hoc tribunals in view of the phenomenon of ‘path dependence’. It may be added that, in the historical dimension of international criminal justice, it also was the pre-determined destination, given its starting points and the special challenges faced by the administration of justice for international crimes at the international level. This is not to say that this necessarily was the best possible choice initially available to the judges in their search of greater efficiency: for example, the potential of the undiluted ‘inquisitorial’ model remained unexplored until more recently, in the context of the ECCC.

Be it as it may, judicial managerialism was the idea whose time came when the ad hoc tribunals matured into established international courts with burgeoning dockets in the end of 1990’s. With benefit of hindsight, it is common sense now that the adoption of the essential elements of the managerial judging model, especially the pro-active role of the judges in the pre-trial stage and their effective involvement both in the trial preparation and in the case-management at trial, is a matter of legitimacy and survival for the institutions of international criminal justice. Moreover, the essential aspects of the managerial model, including the pre-trial access by the judges to the evidence and powers of the bench to narrow down the scope of charges and evidence, may increase the quality and the accuracy of fact-finding. The more focused and in-depth inquiries at trial are conducive to the emergence of the more reliable historical record.

Indeed, the managerial practice in handling international crimes cases does not come without costs, and significant ones, from the ‘effectiveness’ perspective. The imposition by the judges of the limits on the duration of the examination of witnesses and the total time available for the presentation of evidence out of managerial concerns might be seen to obstruct or at least compound the production of a complete and coherent narrative of the events in question, thereby impairing the goal of establishing a historical record. The powers available, for example, to the ICTY judges—i.e. fixing the number of crime sites or incidents most representative of the charges and inviting (if necessary, directing) the prosecutor to reduce the number of counts—have been regarded as particularly problematic. This is a situation in which the considerations of operational ‘efficiency’ clash visibly with the considerations of institutional effectiveness.

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805 Langer, ‘The Rise of Managerial Judging (n 6), at 905 et seq.

806 E.g. Bitti, ‘Article 64’ (n 435), at 1205 (‘it will be essential for the Trial Chamber [of the ICC] to consult the record of the proceedings in order to have the sufficient knowledge of the case to fully control the proceedings; it may be a question of survival for the International Criminal Court to follow the evolution of both ad hoc Tribunals where the Judges have increased their control over the proceedings in order to shorten trials. It is indeed absolutely vital for the Court not to leave the trial in the hands of the parties to avoid lengthy trials which affect the credibility of international justice.’).

807 Rule 73bis(D) and (E) ICTY RPE.

808 See further infra 4.3.3.
For example, a judicial invitation to the prosecution to select the number of crime sites and/or counts on which it wishes to lead evidence at trial necessarily results in the exclusion of other sites or incidents which are regarded, according to the parameters that are not fully clear, as insufficiently ‘representative’. The lack of a judgment on the crimes that were allegedly committed at those sites makes it impossible to establish the truth about the full range of the criminal activities and to prevent the denial of those facts in the future. The surgical operations of this kind performed on the prosecution case may be perceived as excluding entire groups of victims who may never see justice done for the harm which caused their suffering. The ‘myopia’ of international criminal justice is especially grotesque: the same incidents and crimes have (presumably) been fully investigated by the OTP and the incriminating evidence on can be presented, but the prosecution is effectively precluded from doing so. Unless transferred to and acted upon by the national authorities, the investigative record would end up in the Office’s archives, whereas significant resources were spent on enabling the investigation.

4.3 Efficiency perspective: Streamlining and expediting practice

The assessments of the coherence and the practical utility of the managerial judging as a model of international criminal proceedings in the scholarship have been varied. There is a general consensus that the trials in the international criminal jurisdictions are unacceptably long and that the party-driven procedures are ill-suited to the exigencies of the tribunals’ operations. Even those authors opposed to the ways in which the managerial model has been practiced, acknowledge that the pre-trial approach at the ICTY was in need of reform.\(^809\) The self-evident counterbalance to the negative aspects of the unfettered party control is that the judges take the reins of conducting the pre-trial proceedings and play a more active role during the trial. The conception that the solution to the efficiency problem should lie in the growth of judicial involvement and increase in the judges’ competences has gained a strong hold.\(^810\)

Some works have suggested that, in fact, the managerial system as practiced at the ICTY failed to fulfil the expectations. In particular the first in-depth study by Langer and Doherty, who systemically examined the success of the managerial reforms at the ICTY from the much-needed empirical perspective, found that due to the party resistance to the managerialism, the new procedures even contributed to delays, rather than reduced them.\(^811\) However, this study concerns one tribunal and its temporal coverage is limited. It would be safe to say that no general conclusions concerning the success or failure of the managerial model in international criminal law can be drawn at present. It is far from certain that such findings may reverse the previous assumption that, in principle, the more active role of the judges in the pre-trial process is conducive to greater institutional efficiency. Further comprehensive—both quantitative and qualitative—research would be required in order to obtain results that are representative.

Other critiques against the managerial model, however, do not question its fundamental rationale and relevance in international criminal law, but rather attack insufficient or half-hearted implementation thereof in practice, focuses on the particular ways of perfecting it.\(^812\) It is remarkable that assessments of its practicability have diverged depending on the commentator’s background. This holds true, in particular, as regards the power of the ICTY

\(^{809}\) Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 11), at 306.

\(^{810}\) E.g. R. Heinsch, ‘How to achieve fair and expeditious trial proceedings before the ICC: Is it time for a more judge-dominated approach?’, in C. Stahn and G. Sluiter (eds), The Emerging Practice of the International Criminal Court, (Leiden/Boston: Brill, 2009).

\(^{811}\) See Langer and Doherty, ‘Managerial Judging’ (n 137).

\(^{812}\) E.g. Harmon, ‘The Pre-trial Process at the ICTY’ (n 131); Bourgon, ‘Procedural Problems’ (n 135).
Judges under Rule 73bis(D) and (E). The following paragraphs will address some of these criticisms.

### 4.3.1 Forms of trial preparation

#### A. Status conferences

The question of the efficiency of status conferences has been subject to varying views. A number of commentators, including the ICTY Judges, characterized them as useful and ‘important means of guaranteeing, as effectively as possible, the right to trial without undue delay’. By contrast, another practitioner was of the view that the status conferences ‘tend to be rather pro forma affairs that accomplish little’ of their professed goal of expediting pre-trial preparation and ‘are often perfunctory affairs lasting but a few minutes where little is accomplished other than receiving a report from an accused on the conditions of his incarceration at the UN Detention Unit’. Despite their ‘modest contribution’ to the implementation of the work plan in relation to disclosure and filing of pre-trial briefs, their ability to streamline cases is quite limited, as far as the resolution of various problems arising pre-trial with a view to narrowing down the scope of trial are concerned. Thus, it appears that, the utility of status conferences as managerial tools may be lower than expected. There may be general reasons for that, such as the unpreparedness of the judges to use status conferences for obtaining substantive information on the case and for taking decisive steps in the managing it. But this may also be caused by the restricted role of such conferences as compared to the increased importance of other conferences with a stronger managerial import.

#### B. Rule 65<i>ter</i> meetings

The ICTY experience has shown that the personal involvement by pre-trial judges in the 65<i>ter</i> conferences does not guarantee the quality of their participation. The participation by a judge will not by itself lend the desired outcome, namely getting the parties to agree on the contested as well as uncontested matters of fact and law and to cull matters in order to expedite the trial. For the part of both counsel and the PTJ, the importance of ‘human factor’ is difficult to overestimate. Much depends on the PTJ’s authority and reputation with the parties. No less important are his or her professionalism and tenacity in learning about the case and discussing expedient solutions with the parties, count by count and issue by issue, equally as the willingness to invest significant effort in managing the case from early on.

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814 Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 387-8.

815 Ibid., at 388.

816 As envisaged in Rule 65<i>ter</i>(E)(i) and (F)(ii) and (iii) ICTY RPE.

817 Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 144), at 352-3 (‘how these rules are applied in practice may depend to a large extent on the personalities of the judge and counsel. They can be complied with in a perfunctory way, which will contribute little towards ensuring that the trial phase of the case is efficiently conducted.’).

818 Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 390 (recommending that at a 65<i>ter</i> hearing, ‘the pre-trial Judge should summon the parties to a conference, roll up his/her sleeves, lock the door and work with the parties to narrow the issues for trial. Such efforts should include reviewing the indictment and the attached schedules paragraph by paragraph, item by item in order to determine what is and is not contested and why the accused takes issue with a particular paragraph or item. It should also attempt to identify and resolve issues relating to evidence that will be adduced at trial, such as authentication issues.’).
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However, despite the professed policy of activating the PTJs in the discharge of their duties, this subjective aspect may have proven problematic at the ICTY and even more so at other courts (ICTR and SCSL). As commentators have pointed out, the PTJs continued to use their managerial powers under Rule 65ter insufficiently or deficiently. The consequences of that, widely complained of, were that those conferences did not further as much the task of narrowing down or resolving the relevant issues in the pre-trial; nor did they produce agreements tangibly reducing the trial time.

It is believed that appointing a PTJ from among the Trial Chamber judges who will later try the case, is a motivating factor for that PTJ to adopt, from the outset, a pro-active attitude during the Rule 65ter conferences. If not, the judge would be reluctant to tackle the urgent matters of trial preparation head on and, instead, will be inclined to defer such issues for resolution to the Trial Chamber. But to a PTJ who will subsequently sit on the bench, reducing the litigation at trial to issues genuinely contested is more likely to be a matter of professional self-interest. However, as mentioned, in spite of the clear language of ICTY Rule 65ter(A) and for practical reasons, the PTJs were not at all times serving in the same Trial Chamber that was assigned to try the case, which was widely criticized. In principle,

819 T. Meron, ‘An Historical Background and Perspective’, in ‘How to Adjudicate the most serious crimes? Best Practices of Procedure’, Proceedings of the HiiL Colloquium (15-16 October 2007), <http://www.hiiil.org/data/sitemanagement/media/HIIIL_n10189_v1_Publication_Final_Version_Colloquium_2007(1).pdf> (accessed on 1 September 2013), section II.a (stating, among others, that PTJs ‘are more actively involved in the management of the pre-trial process; … play a more proactive role, which increases their effectiveness in ensuring that parties meet their obligations to be trial-ready when a courtroom becomes available; … [are] more involved in setting up the work plan for the presentation of the case, including strict timetables …; requiring both parties to file their Pre-Trial briefs and their witness and exhibits lists well before the start of their cases, this gaining a much greater understanding of the parties’ cases and allowing for more efficient management of the proceedings; … are not better placed to identify the points of agreement and disagreement between the parties before the trial commences’).
820 See Chapter 6, section 3.2.1.
821 Bourgon, ‘Procedural Problems’ (n 135), at 529 (‘admissions or stipulations are not pursued or encouraged and seldom take place before trial; the Prosecution list of witnesses keeps changing, even during trial; new exhibits are regularly added’); Langer and Doherty, ‘Managerial Judging’ (n 137), at 272 (reporting interview data that ‘[m]any judges did not use agreements on disputed issues of fact’ and ‘did not use 65 ter pretrial conferences to narrow down or solve issues in pretrial phase’).
822 ICTY Completion Strategy Report of May 2006 (n 137), para. 27 (‘Pre-Trial Judges seized of cases that they would not hear at trial would, at times, make decisions which should more appropriately be made by the Chamber that would conduct the trial. Alternatively, they would often be reluctant to make important decisions affecting the trial’). See also Harmon, ‘The pre-trial Process at the ICTY’ (n 131), at 390 (‘Further impoverishing the effectiveness of the pre-trial process is that frequently the pre-trial Judge is not a member of the Trial Chamber that will later hear the case for trial. As a result, he or she is not fully invested in the case and may, as experience shows, be reluctant to take the very types of decisions that can streamline a case. In actual fact there have been instances where a pre-trial Judge who has not been a member of the Trial Chamber assigned to the case, either deferred or delayed taking decisions designed to shorten the trial of a case. This needs to change.’); Langer and Doherty, ‘Managerial Judging’ (n 137), at 272 (based on the ICTY interviews, reporting that the pre-trial motions remaining without resolution for months can be blamed on the fact that pre-trial Judges ‘were not and did not know if they would be, members of the Trial Chamber’).
823 For a view opposed to allowing a judge later sitting in the Chamber trying the case to be the PTJ, see M. Fairlie, ‘Revised Pre-Trial Procedure before the ICTY from a Continental/Common Law Perspective’, in G. Sluiter and S. Vasiliev (eds), International Criminal Procedure: Towards a Coherent Body of Law (London: Cameron May, 2009) 325 and 331. Fairlie considers that this scheme is fraught with ‘the increased potential for taint on the part of the relevant Judge’ and threatens the collegiality of the trial panel because the PTJ would be more knowledgeable about the case than his fellow judges. Cf. with L.C. Vohra, ‘Pre-Trial Practices and Procedures’, in G. Kirk McDonald and O. Swaak-Goldman (eds), Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. I (The Hague: Kluwer, 2000) 544 (noting that the concerns of contamination ‘were outweighed by the benefits which would be derived if the pre-trial Judge was a member of the trial chamber hearing the case.’).
824 Harmon, ‘The pre-trial Process at the ICTY’ (n 131), at 390 (‘Further impoverishing the effectiveness of the pre-trial process is that frequently the pre-trial Judge is not a member of the Trial Chamber that will later hear the case for trial. As a result, he or she is not fully invested in the case and may, as experience shows, be
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this element of practice is corrigeble and the observance of the rule on the appointment of PTJ from among the members of that Chamber can be hoped to neutralize the judicial inertia. In fact, a positive shift seems to have occurred in 2006 when the ICTY President Pocar announced, in line with the recommendations of the Bonomy Working Group, the new policy of an early transfer of cases to the Chambers which are expected to try them.

Besides that, it was observed that the potential of the Rule 65ter meetings could be used more fully, had the function of the PTJ not been essentially over with the submission of the defence pre-trial brief pursuant to Rule 65ter(F), and if the PTJ kept holding those meetings in the period between the submission to the Chamber of a complete file of the prosecution case under Rule 65ter(L)(i) and the Pre-Trial Conference. The additional Rule 65ter meetings would enable the PTJ to work with the parties on the basis of their Rule 65ter(E) and (F) submissions, trying to narrow down the prosecution case even further before the Pre-Trial Conference. Arguably, Rule 65ter does not exclude the possibility of convening such meetings.

Ultimately, it is important to realize that there are more serious limits than purely administrative hurdles, both for the efficiency of the 65ter conferences and for the ‘managerial judging’ model in general. This is the previously mentioned resistance by the judges and by the parties to the growing ‘judicial managerialism’. On the one hand, certain judges may feel uncomfortable with the requirements imposed on them by the ‘managerial’ reforms. For instance, they may consider it not properly within the function of a judge to interfere with the parties’ freedom to disagree with one another on the facts in the preparation of their respective cases as well as during the trial. On the other hand, even if judges embrace fully their managerial duties, their efforts may still be neutralized by the parties to a significant extent. The identification of the issues genuinely contested as early as possible requires the bona fide cooperation by both parties, which is also not always forthcoming. Thus, it may be in their partisan interest to adopt dilatory tactics, perform in the way subverting the PTJ’s work plan or to refuse to make admissions on the issues not in dispute. Indeed, especially for the defence, the efforts of the PTJ to encourage the pre-trial agreements on evidence may appear to be overly interventionist and to encroach upon the presumption of innocence and the right of the accused not to cooperate towards his own conviction.

reduced to take the very types of decisions that can streamline a case. In actual fact there have been instances where a pre-trial Judge who has not been a member of the Trial Chamber assigned to the case, either deferred or delayed taking decisions on motions designed to shorten the trial of a case. This needs to change.’). See also Chapter 6.

625 In detail on the reasons why the ICTY judges made a limited use of managerial powers, see Langer and Doherty, ‘Managerial Judging’ (n 137), at 279 et seq.
626 ICTY Completion Strategy Report of May 2006 (n 137), para. 27: ‘This new policy to transfer cases at the earliest possible stage to the anticipated Trial Chamber that will hear the trial has enabled the Pre-Trial Judge who will later serve on the trial bench, as well as the pre-trial staff, to become more familiar with the case. Early transfer has also ensured that there is no impediment to the efficient completion of pre-trial work and is expected to ultimately lead to a more expeditious trial’; Meron, ‘An Historical Background and Perspective’ (n 819), section II.b.
627 Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 392 (who recommends abandoning the practice that ‘[n]o meeting with the pre-trial Judge and the parties occurs in the gap between the filing of the Defence pre-trial brief and the pre-trial conference’).
628 Rule 65ter(B), (H), and (I) ICTY RPE.
629 Langer and Doherty, ‘Managerial Judging’ (n 137), at 286-9.
630 Langer, ‘The Rise of Managerial Judging (n 6), at 903 (‘not all judges have been equally comfortable about becoming active managers of cases.’).
631 Ibid., at 904 (‘the parties in some cases have resisted the re-definition of their roles as assistants toward expedited process, and thus they have not always collaborated as judges expected. For example, defense attorneys and defendants have been reluctant to agree on factual issues before trial.’); Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 389.
632 Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 389, noting that the accused can legitimately refuse to agree to the matters of fact and law in dispute. See also Langer and Doherty, ‘Managerial Judging’ (n 137), at 287 (‘defendants had little to gain from giving information away to prosecutors, or from reaching partial
disincentives for the parties and systemic tensions between the adversarial and managerial elements in the ICTY procedural model foreshadow the fairly limited contribution of the Rule 65ter procedure to expediting the trial process, even if that procedure is superbly managed by the judges.

4.3.2 Pre-trial (and pre-defence) filings

The prior access to the information about the case is a precondition for the effective exercise by the judges of their case-management powers. The extent of the information made available to the judges, its degree of detail, and, even more importantly, their actual familiarity with the case predetermine how prepared and willing they would be to perform as case-managers, and whether their respective decisions will be fair and practicable. It is in the interest of maximizing the efficiency of the managerial model to provide the Trial Chamber with unimpeded and early access to the case materials that is as extensive as possible and to incentivize the judicial corpus for acquiring an intimate understanding of the case already in the pre-trial stage. This consideration speaks in favour of the position that the parties should submit to the Chamber prior to the commencement of the trial or prior to the opening of the respective stage of trial not only their briefs and lists of witnesses and exhibits they intend to present, but also the more detailed substantive information about those evidentiary items. In relation to witnesses, for example, the objectives of efficiency and consummation of the managerial model may require the prior submission of the written witness statements, rather than mere summaries of facts on which the witnesses are expected to testify. As noted, this was already practiced at the ICTR and by some ICTY Chambers.

4.3.3 Managerial powers of judges

Due to the strongly contested nature of the powers of the judges under ICTY Rule 73bis(D) and (E), it is worthwhile assessing them from the efficiency perspective. The view held by many ICTY judges appears to be that the size of the indictments brought by the prosecution was the major reason for the enormous length of the ICTY trials, and that namely by limiting the charging activity of the prosecutor could that problem effectively be addressed. 833 That notion was strengthened as a result of the recommendation by the Bonomy Working Group for the wider use of Rule 73bis. 834 For understandable reasons, the defence (and commentators with that background) have called for a more active approach to be taken by the judges in respect of the prosecution (but not defence) case and found it easier to side with the judges when such approach was taken. 835 The idea was that cutting of the charges and the

833 Kwon, ‘The Challenge of an International Criminal Trial’ (n 271), at 372-3 (‘the most effective measure for tackling the problem of lengthy trials would be to limit the number of charges in the indictment themselves. With a more focused indictment, the production and analysis of crime-base and linkage evidence would be a much speedier process than it currently is in the majority of the cases at the Tribunal.’).
834 ICTY Completion Strategy Report of May 2006 (n 137), para. 29 (in support of the intensive use of the Rule, citing the imposition on the Prosecution in Prlić of a 12-month deadline for the presentation of its case).
835 Bourgon, ‘Procedural Problems’ (n 135), at 529 (pointing that control over the actions of the Prosecutor during the pre-trial phase is insufficient and calling for a greater involvement by pre-trial Judges); Higgins, ‘The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY’ (n 270), at 258-9 (in spite of the prosecution’s reservations, considering Rule 73 bis powers ‘nonetheless an
number of the prosecution’s witnesses down would not only make the case against the accused more manageable but also reduce the number of charges and underlying crimes for which a conviction could possibly be entered. Naturally, the judges perceived the moderation of the charging approach of the prosecutor as the part of their responsibilities and indeed as the only realistic way of striking a delicate balance between the objectives of ensuring a fair and expeditious trial and honouring the commitments under the completion strategy.  

In formulating the charges, the prosecutors face a daunting task of reconciling ‘the logistical impossibility of charging every crime and the importance of identifying representative events that reflect the scope of the criminality’. They tend to bring comprehensive indictments and are extremely reluctant to voluntarily reduce the number and scope of the charges. This would, in their view, fall short of delivering justice to all victims as well as of a frank effort to compile a historical record. Moreover, this would reduce the chances of conviction as compared to the scenario in which the charging is as broad as to amount to a ‘hunting expedition’ (which was indeed the point made by judges rather than by prosecutors).  

The prosecutors’ challenge against this line of reasoning hinged upon several critiques. First, allowing judges to select crime sites and incidents for trial and, even more so, the charges on which the prosecution may proceed, encroaches upon the independence of the Office. Secondly, it compromises the autonomy of the prosecution as a party to the proceedings because it constrains its freedom to formulate and present the case against the accused. Thirdly, as noted, it endangers the various aspects of the tribunal’s mandate, including ending impunity and delivering justice to the victims. Prosecutors pointed to the

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important tool in the possession of the pre-trial chamber’, which is ‘particularly useful in circumstances of prosecutorial reluctance to reduce the scope of an indictment to manageable proportions’ and ‘essential in order to guard against prosecutorial excess’)).  

ICTY Completion Strategy Report of May 2006 (n 137), para. 28 (‘In practice, the length of the Prosecution case has meant that in order to accord the accused due process, Judges have had to allocate a comparable amount of time to the Defence case. The solution for the Judges, therefore, is to limit the length of the Prosecution’s case to require the Prosecution to focus at trial on the strongest part of its case. This in turn will lead to a shorter Defence case.’)  

Tieger, ‘Fair and Expeditious Trials’ (n 260) (noting that even where this balance is found, ‘the result will typically be a trial that dwarfs domestic cases’).  


Ibid. See also ICTY Completion Strategy Report of May 2006 (n 137), para. 28 (‘The philosophy behind the Prosecution’s pleading practices is its obligation to victims.’); Tieger, ‘Fair and Expeditious Trials’ (n 260) (arguing that ‘the objectives of war crimes prosecutions may not be fully served by prosecutions aimed at convicting a responsible leader for only a small slice of his criminality’ and noting that the conviction on the narrow charged in one completed ICTY case, ‘triggered an embittered reaction from the victim community, an outcry which focused in significant part on the fact that the accused were not prosecuted for the larger crimes.’).  

Kwon, ‘The Challenge of an International Criminal Trial’ (n 271), at 373 (under ‘hunting expedition, referring to the practice of ‘charging the accused with more crimes through modes of responsibility’ in order to increase a ‘chance of convicting the accused on at least one charge’). See also Meron, ‘An Historical Background and Perspective’ (n 819), section I (‘Despite certain improvements, the ICTY is still suffering from overblown indictments which contain far too many charges to allow for reasonably fast and efficient trials. I understand that prosecutors prefer ex abundanti cautela to overcharge lest the evidence prove insufficient to obtain convictions. However, it is essential that prosecutors select charges for which the best evidence is available, a speedy trial possible and the prospects for a conviction most likely.’).  

Assessment of Carla Del Ponte, Prosecutor of the [ICTY], provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534, Annex II to Letter dated 29 May 2006, UN Doc. S/2006/353, 31 May 2006, para. 6 (‘The Prosecutor considers that the breadth of remaining indictments cannot be further reduced without beginning to imperil the prospects of … successful prosecution. She regards the decision not to proceed with any counts on a confirmed indictment as being within her exclusive authority, but, especially having regard to the interests of victims, she would not consider it to be a proper exercise of her discretion to reduce the scope of an indictment for reasons simply of lack of time, and in the absence of any reason connected to the merits of the case or the availability of evidence.’); Tieger, ‘Fair and Expeditious Trials’ (n 260) (‘Prosecutors have complained of intrusions on their independence, undue restrictions on their ability to prove their case and unfair limitations on the crimes for which accused should be held accountable.’).
incoherence of the solution to graft such an unprecedented and expanded judicial competence into the original adversarial construct of the ICTY procedure.\textsuperscript{842}

One ICTY Trial Chamber interpreted the judicial powers under Rule 73bis(D) as requiring it ‘to strike a delicate balance between several considerations’, namely the need to fix the number of ‘reasonably representative’ crime sites and the ‘interest of a fair and expeditious trial’.\textsuperscript{843} However, it is impossible not to notice some awkwardness in the judges stepping in the prosecutors’ shoes when determining what counts are most representative of its case, in the sense that their managerial functions may be deemed to go beyond and interfere with the solely adjudicatory role. Despite the natural resistance of the prosecutors’ corpus to the judicial takeover of the theretofore exclusive prosecutorial function, there are certainly benefits to the increased judicial attention to the prosecutorial policy of ‘overcharging’ and the much-needed remedy in a form of judicial review.\textsuperscript{844}

5. CONCLUSIONS AND RECOMMENDATIONS

The path-breaking experience of the \textit{ad hoc} tribunals, with their successes and missteps, has proved the managerial judging to be an indispensable tool in ensuring the more efficient trial proceedings and in guaranteeing accused the right to be tried without undue delay and timely justice to the victims and affected communities. The implementation of the managerial judging model in the \textit{ad hoc} tribunals generated tensions with the initial ‘adversarial’ philosophy of the process. As such, the domestic experiences of some common law jurisdictions are an insufficient parameter for the assessment of the performance and suitability of the managerial judging system in international criminal courts, whose specific context invites and indeed warrants an independent \textit{de novo} evaluation. But domestic systems provide instructive examples of conceptual problems that the managerial model must defend itself from in adversarial contexts, as well as of possible solutions which allow overcoming the parties’ and judges’ own resistance to their roles reconfigured by managerial approaches to the administration of criminal justice. The practice in England and Wales gives an insight into the preoccupation about the growing delegation of judicial functions to non-judicial officers. Along with the proven inefficiency of the ICTY’s solution of outsourcing some of PTJ functions to Senior Legal Officers, this casts a shadow on the validity of the respective ICTY practice. Furthermore, the English concern about the lack of continuity between pre-trial judge-managers and the trial bench throws the tribunal practice of assigning as PTJs the judges other than the members of the responsible Trial Chamber into perspective. The practical considerations of procedural efficiency of the managerial judging model advocate in favour ensuring the continuity of authority over the case throughout the pre-trial and trial stages. This is subject to institutional features of the courts and can be achieved only to the extent possible, given that in some jurisdictions (e.g. STL), the PTJ is an independent figure and may not sit on a trial bench.

Harmon, ‘The Pre-trial Process at the ICTY’ (n 131), at 389 (warning that ‘the Judges must avoid the temptation of taking a broadsword to the Prosecution’s case or unduly restricting the Prosecution in the presentation of its evidence’, because ‘[i]n the end, it is international justice and not the completion strategy that must be served.’); 388 and 392 (referring to the Rule 73bi (E) power of the Chamber as ‘the extraordinary power it recently granted itself’).

\textsuperscript{842} Tieger, ‘Fair and Expeditious Trials’ (n 260) (‘these measures run counter to the logic of the ICTY’s original adversarial common law model, which is based on judicial independence and detachment.’) Tieger goes as far as to compare the possible unintended consequences of inserting the judges into the ‘new habitat’ of managerial judging to ‘the well-intentioned but misguided introduction of animals or insects into a new eco-system’.

\textsuperscript{843} \textit{D. Milošević} Rule 73bis(F) decision (n 282), para. 11; \textit{Perišić} Rule 73bis decision (n 227), paras 10 and 12.

\textsuperscript{844} Jørgensen, ‘The \textit{Proprio Motu} and Interventionist Powers of Judges’ (n 53), at 137 (‘The changes … may provide a platform for a re-examination of charging policy and the exhaustiveness of charging in international criminal proceedings so that gradually the need to reduce the indictments by the customary “one third” diminishes.’).
The expanded managerial role of international criminal judges during pre-trial stage is not in itself banned by the international human rights law and jurisprudence of human rights courts, given the broad ‘margin of appreciation’ enjoyed by states in the matters of organizing criminal proceedings and the law of evidence. However, given that the managerial model operates on the basis of the judicial pre-trial access to the evidence, a concern was raised that it may affect the neutrality and impartiality of the trial judges, especially given that the pre-trial filings by the parties are partisan by nature and cannot be compared to a civil law dossier. That said, the interpretation of judicial impartiality by the tribunals thus far allowed the pre-trial judge’s membership of the trial bench. It is unclear whether this is necessarily inconsistent with the European Court’s interpretations. The latter has particularly emphasized the need for the individual assessment of the circumstances of each case, as well as the material differences between any pre-trial activities and the evidence-taking at trial as an essential guarantee of impartiality. If the managerial powers are applied properly and for the sole purpose of keeping the case within the reasonable limits, the same differences are in place between the functions of the PTJ or the Trial Chamber exercised respectively before and after the commencement of trial.

From the perspective of ‘effectiveness’ and institutional objectives of the international criminal justice, the managerial judging merits varied assessments. On the one hand, authorizing and, if need may be, requiring the judges to be more active in the pre-trial case management is a self-evident solution to the efficiency deficit in international criminal procedure. This problem does not only strike at the heart of the tribunals’ adjudicative function, but also affects their ability to contribute to the broader objectives pursued by the establishment of those courts. On the other hand, the new judicial powers come with new responsibilities. In order to fulfil the manifold expectations and not to be counterproductive, the managerial role must be defined with precision, in a principled and balanced manner, and be played by the judges consistently and confidently. For example, the experiments undertaken by the ICTY included the judicial mandate to moderate the contents of the prosecution case by reducing the number of counts on which to proceed or limiting the number of incidents comprised therein. Necessary as they may have seemed to the judges, such far-reaching powers generated vociferous objections, for they were deemed to encroach upon the prosecutorial prerogatives and to be incongruent with the goals of international criminal justice. Even though some of those competences (e.g. Rule 73bis(E) ICTY RPE) remained sterile products of the procedural laboratory, the operation of the managerial judging led to procedural contentions and additional litigation, which consumed significant resources that could have been spared and used for the core business.

Finally, it is apposite to conclude this Chapter by providing a set of recommendations that could help address some of the problems of the law and practice identified above. It appears that any recommendations for the improved pre-trial case-management in international criminal tribunals would assume that, as a normative matter, that the managerial judging model is an appropriate solution, as it enables the tribunals to address the problem of lengthy trials both fairly and efficiently. As noted, this position is challenged rather than confirmed by empirical inquiries into the actual effects of the managerial reforms in the ICTY; but it would be premature and far-fetched to treat this as a definitive answer to the question of the appropriateness and desirability of this model in international criminal justice.

The normative position on the merits of the model will be formulated at the end of this study.\(^{845}\) In the present context, it is unnecessary to decide whether the move towards a managerial model in the tribunals was right in essence, as compared to any alternative solutions. Objectively, the tribunals’ evolution in that direction was predetermined by the character of the initial ICTY and ICTR RPE and is a fait accompli in international criminal procedure. The idea of the exceeding importance of the judges exercising a greater control

\(^{845}\) See Chapter 12.
over the case from an earlier stage on has been assimilated by the other tribunals, including the ICC. Thus, any constructive suggestions for improvement ought to be reconciled with this reality and be forward-looking: they must seek to perfect rather than weaken or dismantle the managerial system, as that would require an overhaul of procedure in practically all present tribunals. The deficiencies and excesses which have surfaced in the operation of the managerial system in the ad hoc tribunals could be addressed with changes in the law and practice aimed at optimizing the system and making it more effective and balanced.

First, the objective of ensuring the successful implementation of the managerial model calls for fixing the half-hearted legislative solutions and adjusting practices which stray from the managerial ideal. In particular, although the ICTR and SCSL incorporated some major elements of that model, their Rules embodied a more laidback approach than that of the ICTY, and their practice followed the suit. This has proven to be due to the judicial skepticism about the role of a judge as a pro-active case manager in the context of largely adversarial proceedings. The more limited use the pre-trial conferences and the postponed timeline for the submission of pre-trial briefs are the examples of a looser managerial regime at those courts. Requiring parties to submit pre-trial briefs prior to the conference, rather than prior to the commencement of the trial, would have enabled the ICTR and SCSL to make the decisions reducing the volume of the cases earlier on and not when the trial is already underway. But formal regulations are a matter secondary to the informal attitudes and views espouses by the judges as to what manner of moderating the contest between the parties is to be preferred. At the ICTR and SCSL, the judges chose to err on the side of caution by postponing case managerial decisions until trial, even though this limited their ability to exercise the respective powers pro-actively. On a related note, unlike the ICTY RPE, the procedural frameworks of these tribunals authorize the chambers to order parties to file complete written statements by witnesses, as opposed to mere summaries of facts on which they are expected to testify. Insofar as such filings serve to enhance the judges’ familiarity with the general lines of the parties’ cases and to exercise their moderating powers more effectively. Although the absence of this power at the ICTY did not preclude the tribunal from requesting such statements from the parties, it is recommended that a standard to that effect be included in the Rules. This would enhance procedural certainty and help limit unnecessary litigation on these issues.

Secondly, the need to ensure a more balanced and smooth operation of managerial judging may require revising the scope of some of the judicial competences. The power of the ICTY judges under Rule 73bis(E) to order the prosecutor to reduce the number of counts has proved extremely controversial, and with reason so. It is difficult to defend this competence against the claim that it encroaches upon prosecutorial prerogatives of proceeding to trial on the charges contained in the (confirmed) indictment. This power is unparalleled and has not been instrumental in the ICTY practice other than as a proverbial stick that enables judges to compel the prosecutors to accept the judges’ invitations to reduce the number of counts under Rule 73bis(D). The powers contained in the latter sub-Rule, namely to fix the number of crime sites and incidents most representative of the charges and to invite the prosecutor to reduce the number of counts was in some cases invoked by the ICTY judges. But the practice was also criticized on the ground that it disturbed the balance of power between the judiciary and the prosecution. It may be precarious for the judges to be seen fixing a number of crime sites and incidents or making a determination of which of the incidents or crime sites are ‘representative’ of the charges in the indictment, whose ‘master’ should be the prosecutor. Although envisaged also in Rule 73bis(G) of the SCSL RPE, the judicial powers in ICTY Rule 73bis(D) were included neither in the ICTR RPE and nor in the more recent STL RPE. The power to ‘invite’ the prosecutor to reduce the number of counts may remain, insofar as it is not enforceable as an order to the same effect. Finally, the ICTY practice under Rule 65ter(D) of allowing the PTJ to delegate some pre-trial work with the parties to SLOs proved to be ineffective. It is one aspect of the ICTY procedural legacy given that none of the tribunals, including the ICC and STL, codified such a rule.
These limited suggestions help address some of the obstacles that might hinder, or will not facilitate, the effective operation of managerial system in the future. It must be emphasized that core responsibility for its success lies with the judges and the parties. So the most effective solutions can be expected to deal with judicial indecision in taking control over the development of the case, as well as the parties’ resistance to the judicial initiatives. The perception is not uncommon among international criminal judges that the powers they hold nominally are overly interventionist and assertive to warrant application in a party-driven process. However, in order to be effective, the meaningful judicial control and workable managerial system do have to turn into a judicial tyranny. The optimal conception of the judicial role in the context of trial-preparation and case-management at trial should lie somewhere between the two extremes.