International criminal trials: A normative theory

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Chapter 10: Presentation and Examination of Evidence

CHAPTER 10.

PRESENTATION AND EXAMINATION OF EVIDENCE*

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1. INTRODUCTION

After the opening stage of trial examined in the previous Chapter, the court proceeds to hearing the evidence on the merits. Like in any system of criminal adjudication, fact-finding in trials before international criminal tribunals proceeds on the basis of, and is limited to, evidence. In order to reach a judgment on the guilt or innocence of the accused, the tribunals test veracity of the relevant facts alleged by the parties. In doing so, the tribunals rely on evidence tendered in the form of witness and expert testimony, documents, and exhibits.
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With the possible exception of cases involving guilty pleas or admissions of guilt,¹ no facts—other than those on which judicial notice is taken or agreed facts—may be deemed to have been judicially established and serve as the basis for the decision, unless the evidence corroborating those facts has been presented and probed in some form. The hearings during which evidence is submitted and examined, running from the conclusion of opening statements to the Chamber’s invitation to the parties and/or participants to deliver closing arguments, are the centerpiece of international criminal trials.

The present Chapter provides a systematic description of this core phase of international criminal trials in the nine international and hybrid jurisdictions surveyed, as well as analyzes the key differences and similarities between them in respect of the law and practice of evidence-presentation. The primary focus of this Chapter is on sequencing and organization of evidence-taking in (contested) trials.² Establishing a common ground between international tribunals on this issue is a challenging task because the structure of proof-taking varies by tribunal and is subject to diverse regulations and practices. This allows drawing a parallel with the similar status at the national level.³ There, one finds a rift between jurisdictions adhering either to an ‘adversarial’ or ‘inquisitorial’ approach to ordering the fact-finding process in trial court, as well as between the countries which belong to the same procedural tradition.⁴ This Chapter tests the idea that a number of standards reflecting the lowest common denominator between the tribunals can be identified.

Scholars have suggested that the divergent layout of trial is not merely a matter of form but that it is apt to generate substantively different outcomes in identical cases. If a trial conducted under one scheme has resulted in a conviction, this does not mean that the outcome would have been the same had an alternative scheme been adopted, provided that all other relevant circumstances relating to the case itself and evidence remain the same.⁵ If it is true that the order in which evidence is submitted and examined at trial can make such a difference, critical appraisal of trial modalities currently in use at the tribunals at trial becomes especially important. It could help identify optimal epistemic arrangements in

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¹ Chapter 6.
² On the implications of the negotiated justice route for the format of the proceedings, see Chapter 6.
⁴ For an overview, see Chapter 4.
⁵ A. Eser, ‘The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflections of a Judge’, in Th. Küressmann (ed.), ICTY: Towards a Fair Trial? (Antwerp: Intersentia, 2009) 207. See also G. Christie, ‘Some Key Jurisprudential Issues of the Twenty-First Century’, (2000) 8 Tulane Journal of International and Comparative Law 217, at 224 (‘courts operating in different legal cultures can reach different conclusions on the same issues not necessarily because they take different views on the merits of the issue involved, but because they have a different view of the judicial function and/or utilise different judicial techniques.’).
international criminal justice, which is the issue central to the fulfilment of broader socio-political objectives by the tribunal, as well as recommend the possible directions of reform.

In line with the chronological approach chosen, the Chapter examines the order and manner of examining evidence at trial, to the extent possible in isolation from strictly law of evidence-related issues (types of evidence, admissibility, disclosure of (and access to) evidence, and evaluation). The sequence and modes of presenting evidence depend on numerous other systemic factors. One of them is the character of pre-trial investigation as either two parallel investigations conducted by the parties or one single investigation carried out by an impartial judicial authority. Another factor is the role and powers of judges in developing evidence at trial and in fact-finding generally, as well as their competences that may be relied upon for limiting the parties’ autonomy in presenting evidence. This has an influence on how, by whom, and when certain witnesses and experts are to be examined. The third systemic factor is the issue of unified or bifurcated structure of decision-making, which relates to whether the evidence relating to the guilt or innocence and the information relevant to the determination of an appropriate sentence is to be submitted jointly at or during separate—trial and sentencing—stages. These factors will be briefly addressed in this Chapter, to the extent that they inform the sequence of evidence-examination and are relevant to the trial stage.

As usual, the following inquiry into the law and practice of international and hybrid jurisdictions is preceded by a short exposé of standards and practices regarding sequencing of the proof-taking phase of criminal trials in major legal traditions which had most influence on the procedure in the tribunals (section 2). The Chapter then attends to the law and practice of the tribunals regarding the structure of the evidence-presentation stage (section 3). It considers both the issues of the ‘gross’ order of presentation (the order of ‘blocks’ of evidence per actor or per topic) and ‘fine’ order (referring to the order and modes of examining witnesses within each evidentiary block). It devotes limited attention to the manner of submitting documents and exhibits because, as will be shown, such evidence is normally presented through a relevant witness or through bar table motions, and independent sequencing issues do not arise. The order and manner of presenting evidence is best examined with reference to regular witness testimony. Finally, section 4 will evaluate the relevant law and practice of the tribunals in light of the assessment criteria of fairness, goals of international criminal justice, and operational efficiency.

2. PROOF-TAKING PHASE OF TRIAL: A COMPARATIVE PERSPECTIVE

As noted, there are significant differences between domestic jurisdictions when it comes to defining the structure of, and arrangements at, the evidentiary phase of a criminal trial. This divergence in the national context is instructive. It helps trace the origins of specific evidentiary arrangements in international criminal trials and shines light on the reasons for the tribunals to prefer a certain scheme of evidence-presentation over its alternatives. Neither an exhaustive overview of the common law and civil law trial cultures nor the detailed examination of the status in individual jurisdictions is feasible here. The section is limited to highlighting only landmark and representative aspects of national procedure and practices of the presentation of evidence. While the limitations of the broad ‘adversarial’ and

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6 For clarifications regarding the scope of this study, see Chapter 1.
7 In the legal-social research on procedure, the ‘gross order of presentation’ refers to the overarching order in which each of the parties presents evidence, whereas the ‘fine order’ refers to the sequence in which the evidence is presented within each party’s case: J.W. Thibaut and L. Walker, Procedural Justice: A Psychological Analysis (New Jersey: Erlbaum, 1975) 54; W.D. Loh, Social Research in the Judicial Process: Cases, Readings, and Text (New York: Russel Sage Foundation, 1984) 484.
‘inquisitorial’ categories are readily acknowledged, they are used here for sake of convenience.\[^8\] Without diminishing the nuances in individual domestic systems, the models still capture and enable a broad-brush understanding of the essential differences between the common law and civil law styles of sequencing the evidentiary stage and questioning witnesses.

The ‘adversarial’ approach in common law trials hinges on the notion of trial as a one-day-in-court event.\[^9\] It takes the form of a contest between two equally-positioned parties before a neutral fact-finder (a jury) uninformed about the case before evidence in presented. This predetermines the nature of the trial essentially as a party-led activity organized around two opposed partisan cases which crown the parties’ efforts in uncovering, thoroughly preparing, and bringing to court best evidence in support of their respective claims. The ‘adversarial combat’ is rigidly structured and painstakingly regulated so that each piece of evidence is brought before the court at an appropriate time. The numerous formal rules governing an ‘adversarial’ duel between the parties must be strictly observed and may not be departed from without compelling grounds. This is so because the compliance with long-established formal sequence operates as a safeguard of the due process: orderliness is fairness. Far more inflexible than the ‘inquisitorial’ presentation scheme, the ‘adversarial’ scheme is a sequence of alternating evidentiary blocks for each party, the prosecution and the defence.\[^10\] Typical for the ‘adversarial’ set-up is an authoritative rule that the evidence showing the defendant’s guilt must be presented before the prosecution closes its case in order to enable the defence to respond to the accusations.\[^11\] In limited situations, judges may exercise discretion to allow further presentation of prosecution evidence after the close of the case. In England and Wales this includes, in particular, evidence in rebuttal, technical evidence omitted by counsel, and, in exceptional cases, the evidence that has become available after the close of the case, which may be a ground for its reopening.\[^12\]

Consequently, the volume of evidence that may be led in subsequent phases of the proceedings after the close of the case (as part of rebuttal/rejoinder or where the case is reopened) is by necessity narrower than evidence-in-chief. This limitation is underpinned by the compelling procedural logic of placing the burden of proof on the accuser and by the requirements flowing from the presumption of innocence. It is only after the prosecution has rested its case that the defence will know what the evidence against the accused is and may start meaningfully responding by presenting its own case, provided that prosecution case is sufficiently strong (i.e. that there is ‘case to answer’). Where there is no case to answer on any of the charges, a judgment of acquittal shall be entered on the relevant charge upon defence motion. This saves the accused from the hardship of standing trial where there is no evidence capable of supporting a conviction. If and once the defence has presented its evidence, the prosecutor may be allowed to resume presentation in order to rebut the defence evidence in case it has given rise to matters *ex improviso*.\[^13\] After that, the defence may lead evidence in rejoinder to address new matters raised by rebuttal evidence, if authorized by the bench. Evidence on the guilt or innocence of the accused and the sentencing submissions are received and the respective issues decided upon at separate stages and by different

\[^8\] For a methodological discussion of this matter, see chapters 1 and 4.

\[^9\] Chapter 4.

\[^10\] On the structure of English trials, see R. May, *Criminal Evidence*, 4th edn (London: Sweet & Maxwell, 1999) 494. In the US, the structure of criminal trials is not explicitly provided for in law but invariably follows the sequence of prosecution evidence; defence evidence; rebuttal; and rejoinder. See also A. Orie, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings’, in Cassese/Gaeta/Jones (eds), *The Rome Statute* 1445 (‘a strict order is observed at trial, separating the presentation of evidence by the prosecution and the defence. The parties present their case.’).

\[^11\] *R. v. Rice*, 1 Q.B. 857 [1963].


adjudicators. Except for magistrate courts where issues of both law and fact are decided upon by a single lay judge, common law trial courts are bifurcated: trier of fact (juries) deliberate on the verdict independently from the professional judge who as the trier of issues of law decides on the sentence. Consequently, any submissions regarding the sentence will be relevant only in case the jury convicts, after which a separate sentencing hearing may be held before the judge at which the parties may submit character evidence and other sentencing submissions.

By contrast, criminal trials in the continental jurisdictions that still hold to their ‘inquisitorial’ legacy (e.g. France, Belgium, and the Netherlands, as opposed to Italy and to a lesser extent Germany) are structured as a uniform official inquiry conducted by judges. The judges, and particularly the president, play a leading role in eliciting evidence from witnesses, with counsel for both sides assisting the court to probe the one and the only ‘case of the truth’. There are no distinct phases in the process of hearing and examining evidence in court, such as the presentation of prosecution and defence evidence. The only rule is that the hearing of evidence should start with the questioning of the accused by the presiding judge and then by the parties, after which witnesses (as well as court experts and civil parties) are questioned in the same order, unless otherwise provided. Generally, the hearing of evidence is structured by the court in the way most appropriate for the establishment of the truth of case on the dossier. For the purpose of examination, there is no division between the evidence on the guilt or innocence and that regarding sentencing. The court receives both types of submissions throughout the trial and deliberates on the basis of the trial record without interrupting the deliberation in order to receive submissions on the sentence where the guilty verdict is entered, insofar as such submissions must be made as part of the closing speeches. Even where the bench includes lay assessors, they participate in deliberations alongside with professional judges and thus need not be shielded from any inadmissible prejudicial information prior to reaching a verdict.

The sequence in which witnesses are questioned at trial and the manner in which they may be examined by the parties and the court are other crucial areas in which the ‘great divide’ between civil law and common law is visible. There are material differences in the nature and scope of questions that may be asked by certain actors at certain stages of trial and—more generally—the extent to which the timing and nature of questions matter. It is characteristic for adversarial systems to be concerned with the nature and scope of questions that may be posed to a witness. Given how the parties’ cases are built, such systems draw a principled distinction between witnesses depending on which party has called them, and all evidence in the case is seen through this binary lens. The adversarial system establishes the admissible subjects and form of questioning by each party related to the question of whether the witness is ‘his’ or that of the ‘adversary’. Common law provides an elaborate and sophisticated set of standards governing examination-in-chief (direct examination), cross-examination, re-examination (re-direct examination), and, possibly re-cross-examination.

The common law rules on the examination of witnesses are highly specific. Given that, as will be shown, the ad hoc tribunals largely emulate those rules, it is more appropriate to reserve a more comprehensive overview for later. The discussions here can be limited to

14 See further Chapter 4.
15 See also Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 10), at 1444 (‘The parties, although entitled to put forward evidence and to examine the witnesses, play a supplementary role making submissions to the court for evidence to be heard additionally. ... Access to the dossier, containing a full report of the pre-trial investigations, enables the court to play this dominant role at the trial.’).
16 Arts 328 and 332, Code of Criminal Procedure (France, Code de Procédure Pénale); Arts 286 and 291 of the Code of Criminal Procedure (Netherlands, Wetboek voor Strafvoering, WvS).
17 See Chapter 11.
19 See infra 3.2.2.
general principles that can be found in specific domestic jurisdictions and are sufficiently representative. In England and Wales, the examination of a witness proceeds in three steps (examination-in-chief, cross-examination and re-examination). The rule is that the party will have the last word with its witness. Examination-in-chief is meant to allow the witness to provide an account of relevant facts from his personal knowledge. Leading questions, i.e. questions suggesting the desired answer or assuming the existence of a fact, are prohibited at examination-in-chief because the party may not discredit its own witness. Subject to leave of the court, an exception can made for a witness who turned hostile to the party who called him. The purpose of cross-examination is to weaken the effect of the evidence-in-chief given by the adverse witness by raising matters regarding his or her credibility and to elicit information material to the cross-examining party, in order to avoid recalling that witness. Where the witness is questioned on matters material to the cross-examiner’s case, that party is under the duty to put to the witness his case, which contradicts the evidence given by that witness. But normally cross-examination will be limited to matters raised in evidence-in-chief and the credit of the witness. As a rule, leading questions are allowed at cross-examination because they are apt to challenge the witness’s evidence-in-chief and raise doubts as to her credibility; however, questions that are irrelevant, vexatious, disrespectful, or constitute an unwarranted attack on the witness are banned. The judge may curtail cross-examination where an allegation of criminal conduct is made in the lack of sufficient evidence. Finally, where cross-examination has been conducted, the party calling a witness may re-examine the witness on the issues arising from cross-examination; no new matter may be introduced without leave of the judge.

Generally, the judicial role is to conduct the proceedings, in which the judge enjoys significant discretion. As a matter of law and despite the common view to the contrary, the judges in common law jurisdictions possess formal fact-finding powers, including the power to call witnesses proprio motu and to examine witnesses. In trial practice, they, however, exercise restraint in invoking those powers. Judges will normally refrain from posing questions to witnesses on substantive matters regarding the case, as opposed to seeking clarifications of the testimony. An active role in the examination of witnesses might interfere with the party’s line of questioning the witness and undermine his or her strategy in relation to that witness. Moreover, a judge has no prior knowledge of evidence and is unable to anticipate whether the answer given by the witnesses would go in favour of the defendant.

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20 May, Criminal Evidence (n 10), at 525-6.
21 Ibid., at 528-32. Cf. Rule 611(c) of the US Federal Rules of Evidence (‘Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. … When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.’).
22 Ibid., at 533.
23 Browne v. Dunn [1893] 6 R. 67, H.L.
24 Treacey [1944] 2 All E.R. 229. See also Rule 611(b) US Federal Rules of Evidence (‘Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.’).
27 May, Criminal Evidence (n 10), at 545.
28 See e.g. Rule 611(a) US Federal Rules of Evidence (‘The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.’).
29 Rule 614(a) and (b) US Federal Rules of Evidence.
or otherwise, and what impact both the question and answer would have on the jurors’ minds. In the ‘adversarial’ model, the presentation of evidence is the exclusive responsibility of the parties; procedural activism of judges is at odds with that systemic principle.\textsuperscript{30} This is different for those questions from the bench that merely seek to clarify matters, so that the jury can properly appreciate the testimony. Otherwise, the judge shall remain passive in order to preserve the appearance of impartiality and to avoid the respective challenges being brought by the parties and reversal on appeal: examination of witnesses on substantive issues is clearly improper and possibly misconduct.\textsuperscript{31}

In contrast to common law countries, continental jurisdictions faithful to the ‘inquisitorial’ tradition in terms of the organization of proof-taking phase of trial, follow the unitary mode of questioning and make no distinction among witnesses based on whether they testify in favour or against the accused.\textsuperscript{32} This is a consequence of the fact that all witnesses are regarded as ‘witnesses of the court’ rather than as witnesses for the parties. Therefore, there is no need to use separate modalities of examination varying in the nature, scope, and purpose of the questions that may appropriately be posed to witnesses at certain stages of examination.\textsuperscript{33} The bulk of questioning will be conducted by the judges familiar with the evidence on the dossier and having a fairly clear idea about any additional new evidence called during trial. The judges are empowered and, moreover, obliged to ask all the questions that they believe need to be asked in order to establish the truth in the case. Guided by this objective, judges do not fear being perceived as not fully neutral whenever posing a question on any substantive matter, due to the extent or character of the question.\textsuperscript{34} The parties’ questioning may occasionally be conducted from their slightly more ‘adversarial’ positions (subject to practice in each jurisdiction). But their role in the examination of evidence tends to be limited to residual matters not covered in the extensive judicial questioning. In any event, any questioning is subject to the requirement that it must aim at making a useful contribution to truth-finding, and this notion informs the questioning regime with a considerable degree of uniformity, as compared to the status in common law.

\textsuperscript{30} M. Frankel, ‘The Search for Truth: An Umpireal View’, (1975) 123 University of Pennsylvania Law Review 1031, at 1042 (‘The “facts” are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. … Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times. … It is not a regular thing for the trial judge to present or meaningfully to “comment upon” the evidence.’); S. Salzburg, ‘The Unnecessarily Expanding Role of the American Trial Judge’, (1978) 64 Virginia Law Review 1, at 55 (‘Judge’s questioning may confer an unintended advantage upon one party that the lawyer could not have obtained otherwise and that the opposing party cannot counteract during the trial’); M. Damaška, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’, (1997) 45 American Journal of Comparative Law 839, at 850-51; M. Fairlie, ‘The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit’, (2004) 4 International Criminal Law Review 243, at 273-8.


\textsuperscript{32} See also Oriè, ‘Accusatorial v. Inquisitorial Approach’ (n 10), at 1444 (‘technical issues such as how to examine a witness in examination in chief or in cross-examination become irrelevant. Access to the dossier, containing a full report of the pre-trial investigations, enables the court to play this dominant role at the trial.’).

\textsuperscript{33} Ibid., at 1453 (‘It makes no sense to limit the right of the parties while cross-examining a witness to go beyond the boundaries of the subjects touched upon in the examination in chief or to make a distinction between the admissibility of leading questions in examination in chief and in cross-examination, if it is the court—and not the parties—that is primarily responsible for the conduct of the examination of witnesses at trial. Such a rule may fit well in an adversarial trial but lacks its very basis in an inquisitorial trial.’).

\textsuperscript{34} Damaška, ‘The Uncertain Fate of Evidentiary Transplants’ (n 30), at 851 (‘In continental systems, by contrast, bench examinations are not perceived as dangerous to judicial impartiality. This is because the polarities generated by the participation of lawyers in evidence-gathering are less pronounced. … [W]itnesses are “common” to both sides, and their aggressive interrogation from the bench is not viewed as help to one or the other party.’).
For example, in German criminal trials, over time the presentation of evidence has become more tilted towards an adversarial mode than in some other continental countries (e.g. France or Belgium). Even so, in Germany, the witness being examined shall first be directed by the judges to state all he knows about the subject indicated to him. Further questions may be asked to clarify and complete the statement and to establish the grounds on which the witness’ knowledge is based. In Dutch criminal trial, a witness is required first to state as clearly as possible what he has perceived and what the grounds of his knowledge are. After this narrative account, the witness shall be questioned by the presiding judge and other members of the bench, the officer of justice (prosecutor), and the accused; the latter will be allowed to question first the witnesses that have not been heard in the pre-trial stage and summoned at the initiative of the accused. However, no distinct questioning modalities are envisaged depending on ‘whose’ witness is being questioned or who conducts the questioning.

This overview indicates that there may be very few specific standards or rules of thumb in the domain of the examination of evidence at trial that are accepted across the board. Actually, one shared principle is that judges may exercise control over the conduct of the trial and moderate testimonial process with a view to avoiding delays and making the presentation effective for the establishment of the truth. But the extent of the appropriate intervention in the presentation of evidence and the judges’ own role in the testimonial process vary decisively between the jurisdictions typically considered to be ‘representative’ of the major procedural traditions.

3. PRESENTATION AND EXAMINATION OF EVIDENCE IN INTERNATIONAL CRIMINAL PROCEEDINGS

3.1 IMT and IMTFE

3.1.1 Order of presentation of evidence

The provisions in the IMT and IMTFE Charters regarding the structure of the presentation phase are not identical. Article 24(e) of the IMT Charter provided that the prosecution witnesses were to be examined and after that the defence witnesses for the Defense, and that thereafter ‘such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.’ Two distinct—prosecution and defence—phases of evidence were envisaged, possibly followed by rebuttal by both parties. In the course of the trial, the Tribunal held that the admission of rebuttal evidence should be requested by the parties in writing. By contrast, Article 15(e) of the IMTFE Charter only envisaged that ‘[t]he prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony’. In practice, the mode and sequence of case presentation at the Tokyo trial followed the same ‘common-law’ template. Although the IMTFE Charter did not envisage rebuttals, the Tribunal permitted both parties to present such evidence, provided that it was probative.

35 In more detail, see Chapter 4.
36 Sections 69(1) and (2) Code of Criminal Procedure (Germany, Strafprozeßordnung, StPO).
39 ‘Sixty-Eighth Day, Tuesday, 26 February 1946’, in Trials of Major War Criminals before the International Military Tribunal, Vol. VIII (Nuremberg: International Military Tribunal, 1947) 281 (ruling that ‘if it is desired to call any witnesses after closing the ease on behalf of any of the chief prosecutors, that a written application should be made to the Tribunal for the calling of such witnesses’).
40 Boister and Cryer, The Tokyo International Military Tribunal 92 and 113 (only the prosecution took advantage of this opportunity to provide the court with Saionji-Harada Memoirs).
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In departure from the common law script, the Tokyo Tribunal ruled that evidence in mitigation could be offered immediately after all other evidence was received. This was preceded by the disagreement among the judges on whether such evidence could be allowed at all or what the optimal timing for it was.\textsuperscript{41} In view of the strategic choice by the defence not to present mitigation evidence contradicting the pleas of innocence, only one defendant (Kido) had tendered such evidence.\textsuperscript{42}

3.1.2 Order and modes of questioning witnesses

Both charters accorded the accused the right to conduct defence, including the presentation of evidence and confrontation with prosecution witnesses.\textsuperscript{43} Whilst the IMT Charter did not specify, unlike the IMTFE Charter, whether represented defendants could personally cross-examine witnesses, the IMT ruled that possibility out except for cases of self-representation.\textsuperscript{44} The right to confront witnesses was not absolute, being subject to the tribunals’ discretion and rules regarding admissibility of affidavits and depositions.\textsuperscript{45}

The IMT Charter separately mentioned the duty of both parties to interrogate and their right to cross-examine any witnesses and any defendant who gives testimony, thus clinging to the common-law language and concepts of questioning witnesses.\textsuperscript{46} As a result of the formula employed in Article 16(e), the right of the IMT defendants to confront witnesses was limited to prosecution witnesses and did not extend over witnesses called by the Tribunal.\textsuperscript{47} The Charter also provided the Tribunal with the opportunity to put any question to any witness and to any defendant at any time, and IMT judges did occasionally pose questions to witnesses, including the defendants.\textsuperscript{48} The IMT practice on the scope and modes of questioning emulated common law rules.\textsuperscript{49} Leading questions were not allowed at

\textsuperscript{41} Ibid., at 92-3 (Judges Mei, Northcroft, Zaryanov and Cramer were opposed to allowing such evidence in as it was unnecessary; Judge Röling argued that the presentation of such evidence prior to the issuance of judgment was appropriate given the unity of the adjudication on the issues of law and fact; and Judges Webb, Bernard, Pal, and McDougall were in favor of hearing such evidence only upon a ‘guilty’ verdict).

\textsuperscript{42} Ibid., at 93. See also Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 10), at 1462 (‘The IMTFE decided proprio motu to allow the accused to present mitigating evidence. Apart from defendant Kido, none of them used this opportunity, since they thought it unfair that they would be required to present mitigating evidence prior to the Tribunal’s determination of their guilt or innocence.’).

\textsuperscript{43} Cf. Art. 16(e) IMT Charter (‘A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution’); Art. 9(d) IMTFE Charter (‘An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.’).

\textsuperscript{44} The IMT held that ‘defendants who are represented by counsel have not the right to cross-examine witnesses. They have the right to be called as witnesses themselves and to make a statement at the end of the Trial’: ‘Tenth Day, Saturday, 1 December 1945’, in Trials of Major War Criminals before the International Military Tribunal, Vol. III (Nuremberg: International Military Tribunal, 1947) 33.

\textsuperscript{45} See e.g. Art. 13(c)(3) IMTFE Charter. Boister and Cryer, The Tokyo International Military Tribunal 108-9 (the massive admission of affidavits by the Tokyo Tribunal compromised the right of the accused to examine witnesses and overall fairness of the proceedings).

\textsuperscript{46} Art. 24(g) IMT Charter.

\textsuperscript{47} Art. 16(e) IMT Charter (‘A defendant shall have the right … to cross-examine any witnesses called by the Prosecution.’).

\textsuperscript{48} Arts 17(a) and (b) and 24(f) IMT Charter. See further Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 10), at 1457 (referring to 4 IMT 382-4, 326, 336-9, 495-6; 10 IMT 156-7; and 11 IMT 27-8).

\textsuperscript{49} J.F. Murphy, ‘Norms of Criminal Procedure at the International Military Tribunal’, in G. Ginsburgs and V.N. Kudriavtsev (eds), The Nuremberg Trial and International Law (Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1990) 71 (observing that the common law model was largely followed as ‘the examination of witnesses was left almost entirely in the hands of counsel, and the judges did not play the inquisitorial part they normally assume on the continent.’).
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examination-in-chief. Although the IMT Charter did not explicitly authorize parties to re-examine their witnesses, the Tribunal authorized this mode of questioning for both parties. The same applies to further cross-examination – there are examples of authorization to re-cross-examination on the Nuremberg trial record. Common law on cross-examination was followed in practice, although some counsel had trouble understanding and following those rules, whether due to excessive zeal or because of inexperience. Thus, one Soviet counsel had to be reminded by the members of the bench of the duty to keep questions within proper limits, albeit to little effect.

By contrast, Article 15 of the IMTFE Charter drew no distinction between the examination by the party who called the witness and by the other party, using instead a more neutral term ‘to examine’. The IMTFE judges were not expressly availed of the power to put questions to witnesses and defendants ‘at any time’, but it could be inferred from the Tribunal’s fact-finding competence. In respect of examination-in-chief, the Tokyo Tribunal applied common law rules (e.g. the ban on leading questions), but did so inconsistently. Counsel were directed to avoid such questions, without this direction being properly enforced, whilst the questions assuming unproved facts were allowed. Initially, cross-examination was unrestricted but eventually the court limited it to issues arising out of the examination-in-chief and matters of credibility.

3.1.3 Presentation of documents and exhibits

The IMT and IMTFE charters did not regulate the submission of the documents or exhibits from the ‘bar table’, but their non-technical evidence law did not preclude the admission. The Tokyo Tribunal was specifically authorized to admit, subject to the requirements of probative value and relevance, any governmental documents, medical reports, affidavits and depositions, diaries, and letters. At Nuremberg, the Tribunal authorized, upon application by US chief prosecutor, the admission in evidence of documents or portions of documents that were read in court or cited in court, on the condition that they had been translated into the respective languages of the members of the Tribunal for their use and that defence counsel had been supplied with sufficient numbers of copies in German.

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51 E.g. ‘Twenty-Sixth Day, Thursday, 3 January 1946’, in The Trial of Major War Criminals before the International Military Tribunal, Vol. IV (Nuremberg: International Military Tribunal, 1947) 354 (the Tribunal inquiring with the prosecution, after defence cross-examination, whether it wishes to re-examine witness Ohlendorf) and 381, 384, and 390; ‘One Hundred and Third Day, Tuesday, 9 April 1946’, in The Trial of Major War Criminals before the International Military Tribunal, Vol. XI (Nuremberg: International Military Tribunal, 1947) 147.


54 Art. 11(a) and (b) of the IMTFE Charter.

55 Boister and Cryer, The Tokyo International Military Tribunal 110.

56 Ibid., at 105 and 110.

57 Art. 19-20 IMT Charter; Art. 13(a) and (b) IMTFE Charter.

58 Art. 13 IMTFE Charter.

3.2 ICTY, ICTR, and SCSL

ICTY, ICTR, and SCSL Rule 85 reflects a strong common law influence in part of both the order of presentation of evidence and modes of questioning witnesses, as is seen from the terminology it uses (‘cross-examination’, ‘re-examination’, ‘rebuttal’, and ‘rejoinder’). Presentation of evidence hinges on two cases each advanced by the party responsible for deciding what evidence to lead in its best interests, and for preparing witnesses for giving testimony in court during ‘proofing meetings’ held shortly before trial hearings. The common law logic also manifests itself in the order of presentations: the party with the burden of proof (prosecution) calls its witnesses first, after which the defence presents its case, if need be, possibly followed by rebuttal and rejoinder evidence. In addition, Rule 85(A) authorizes the Chamber to amend the order of presentation of evidence ‘in the interests of justice’.

This ‘adversarial’ format is diluted in at least two respects. Firstly, the Chambers hold the power to ‘order either party to produce additional evidence’ and to ‘proprio motu summon witnesses and order their attendance’, and such evidence is allocated a distinct slot in the case presentation (after all evidence has been submitted by the parties). Secondly, judges have an unqualified power to question witnesses; theoretically, this does not preclude them from asking substantive questions or even from taking over the examination from the parties.

3.2.1 Order of presentation of evidence

A. General features

The right of each party under Rule 85 (A) of the ICTY, ICTR, and SCSL RPE to call witnesses and present evidence is not absolute. It is subject to judicial powers to control the process and manage the case. As discussed in Chapter 8, this includes: calling upon the parties to shorten the estimated length of the examination in chief for some witnesses, limiting the number of witnesses to be called, determining the time available for presenting evidence, and by reducing the scope of charges in the preparation of trial. Moreover, the ICTY may refuse to hear a specific witness if he or she was not on the party’s witness list. These powers enable the Chamber to manage, not micro-manage the case. Other than that, the party should still have the autonomy in deciding whom of the witnesses to call and in what order, within the time frame set by the Chamber.

Rule 85(A) establishes a default ‘gross’ order of receiving evidence or information at trial per originator—the prosecution, the defence or the Chamber—which in an early decision was referred to as the order of presentation simpliciter.  

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60 Rule 85(A) ICTY, ICTR and SCSL RPE (‘Each party is entitled to call witnesses and present evidence.’).
61 Rule 85(A)(v) ICTY and ICTR RPE; Rule 85(A)(iv) SCSL RPE. Note that the SCSL RPE incorporates no rule identical to Rule 98 ICTY and ICTR RPE, but the SCSL Chambers may exercise the evidence-generating competence under Rule 54.
63 Rules 65ter; 73bis and 73ter ICTY RPE; Rules 73bis and 73ter ICTR RPE; Rule 73bis and 73ter SCSL RPE.
64 Rule 90(G) ICTY RPE.
65 R. May and M. Wierda, International Criminal Evidence (Ardsley, NY: Transnational, 2001) 342 (stating that the judges should only be allowed to set a time limit for the presentation of evidence or to reduce the number of witnesses, but not a power to determine which witnesses to call).
66 Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC, ICTY, 1 May 1997 (‘Delalić et al. decision on presentation of evidence’), paras 25 and 28 (construing Rule 85 as providing, on the one hand, the ‘order of presentation of evidence simpliciter’ in paragraph A, which does not concern the order and scope of examination of witnesses, and, on the other
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(i) evidence for the prosecution;
(ii) evidence for the defence;
(iii) prosecution evidence in rebuttal;
(iv) defence evidence in rejoinder;
(v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

It is self-evident that the last item of this six-phase sequence (sentencing submissions) is an outlier – it relates to the purpose of the respective information without providing for the order or form of such submissions.

By contrast, the SCSL presentation scheme has been fourfold from the outset. This may be explained by a stronger footing of the SCSL procedure in the Commonwealth-style (rather than the US-style) common law system. For example, one difference from the ad hoc tribunals is that the SCSL prosecution may present evidence in rebuttal qua the third step in the sequence, but only with leave of the Chamber. Furthermore, the defence is not formally entitled to present evidence in rejoinder. The proof-taking at the SCSL concludes with the examination of the evidence ordered by the Chamber, rather than with sentencing submissions which are to be reserved for special sentencing hearings to be held in case of conviction.

As the tribunals themselves have been ready to acknowledge, the sequence in which evidence is taken is predominantly ‘adversarial’. This scheme assigns a leading role in the production of evidence to the parties. Judges are entrusted with independent fact-finding powers and the powers to ensure that the parties’ questioning is effective in light of the goal to ascertain the truth. They will normally not exercise their proprio motu power to call additional evidence before each of the parties has taken turns in presenting evidence. The Chamber evidence is allocated the fifth step in the presentation sequence and is merely complementary: it is there to ensure that material witnesses not called by any of the parties may still be heard where it is necessary in the interests of establishing the truth.

The raison d’être of Rule 85(A) is best expressed by the formula ‘the evidence should be called at the hand, the ‘order and scope of examination of witnesses’ in paragraph B which proprio vigore relates to Rule 85 (A)).

67 At the ICTY, the inclusion of step (vi) was agreed upon in March 1998 but formally enacted at the 18th plenary (9-10 July 1998): Fifth Annual Report of the ICTY, UN Doc. A/53/219-S/1998/737, 10 August 1998, para. 108. At the ICTR, it was added by the amendment dated 8 June 1998. 68 Cf. Rule 85(A) SCSL RPE (7 March 2003).

69 Decision on Amendment of the Consolidated Indictment, Prosecutor v. Norman et al., Case No. SCSL-044-14-AR73, AC, SCSL, 16 May 2005, para. 46 (observing that SCSL trial procedure draws upon the Criminal Procedure Act, 1965 of Sierra Leone ‘precisely because that Act lays down the basic procedures of adversarial criminal trials that are followed in Sierra Leone, which may be appropriate for our circumstances.’).

70 Rule 100 SCSL RPE.

71 Delalić et al. decision on presentation of evidence (n 66), para. 16 (‘Rule 85(A) without doubt belongs to the adversarial legal system. It is clearly not inquisitorial. It is, therefore, useful to rely on the practice of common law legal systems for interpretation of its scope and meaning if there is any ambiguity.’); Decision on the Prosecution’s Alternative Request to Reopen the Prosecution Case, Prosecutor v. Delalić et al., Case No. IT-96-21-T, TC, 19 August 1998 (‘Delalić et al. reopening decision’), para. 20 (‘there is little difficulty in observing the predominating features of the common law system in our Rules relating to the presentation of evidence, without ignoring the inquisitorial features. The order for presentation of evidence and the closing arguments clearly portray the philosophy of the total.’) See also Decision on the Prosecution’s Motions to Admit Prior Statements as Substantive Evidence, Prosecutor v. Limaj et al., Case No. IT-03-66-T, TC II, ICTY, 25 April 2005 (‘Limaj et al. prior statements decision’), para. 8 (‘While the procedure and evidentiary system of this Tribunal represents an attempt to blend elements of both civil and adversarial systems, it remains primarily adversarial.’).

72 Rule 90(F) ICTY, ICTR, and SCSL RPE.
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proper time.’

As noted, the sequence of evidentiary blocks may be adjusted ‘in the interests of justice’. It was argued that it would therefore be possible for the Chambers to adopt a civilian structure of presentation. However, the default order has normally been followed in practice. In Semanza, the ICTR clarified that Rule 85 allows ‘altering the sequence of presentation of evidence, not … determining whether a particular category of evidence may be presented at all’. The power to deviate from the established order does not extend as far as to fundamentally alter the ‘adversarial’ face of the trial and substitute it for the ‘inquisitorial’ style scheme. Indeed, it is inconceivable for any Chamber to order that its evidence be heard before allowing the parties the opportunity to present their case: other elements of the procedure would preclude that. The denomination of the modes of questioning in Rule 85(B) is ‘common law’ and it is not subject to variation. The accused may appear as a witness in his or her own defence, which is virtually the only way for the accused to personally supply evidence in the formal sense. By contrast, in ‘inquisitorial’ criminal trials, the accused is treated strictly as a ‘party’, not witness, and may not give sworn testimony.

Instead, the power to deviate from the default presentation sequence is reserved for more standard situations. These may include reopening the case and allowing a party to call its witness during the case for the other party where the witness might otherwise become unavailable (e.g. in case of terminal illness). The ICTY Appeals Chamber pointed out that the order in Rule 85(A) ‘shall’ be followed, unless there are countervailing interests of justice, which means that the Trial Chamber must advance reasons for departure from the rule.

In joint trials of several accused, the full round of presentation sequence (prosecution and defence evidence, evidence in rebuttal, and evidence in rejoinder) should to be

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73 Delalić et al. reopening decision (n 71), para. 18 (‘While it seems clear … from Sub-rule 89 (C) that evidence subsequently available to the Prosecution could be introduced at a later stage of the proceedings at the discretion of the Trial Chamber, any further consideration of the limits to the exercise of this discretion must take as its starting point the well settled rule of practice that evidence should be called at the proper time.’).

74 Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 27 November 2008 (‘Prlić et al. documents in cross-examination trial decision’), para. 19 (‘the division between the different phases described in Rule 85 (A) of the Rules is not absolute’ as the sequence may be changed if the Chamber deems it to be in the interests of justice); Decision on the Interlocutory Appeal against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.14, AC, ICTY, 26 February 2009 (‘Prlić et al. documents in cross-examination appeal decision’), para. 23; Decision on Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses, Prosecutor v. Taylor, Case No. SCSL-03-1-T, TC II, SCSL, 29 June 2010 (‘Taylor additional witnesses decision’), para. 7.

75 Eser, ‘The “Adversarial” Procedure’ (n 5), at 221.

76 Decision on the Prosecutor’s Motion for Leave to Call Rebuttal Evidence and the Prosecutor’s Supplementary Motion for Leave to Call Rebuttal Evidence, Prosecutor v. Semanza, Case No. ICTR-97-20-T, TC III, ICTY, 27 March 2002 (‘Semanza rebuttal decision’), para. 8.

77 Rule 85(C) ICTY, ICTR, and SCSL RPE. On unsworn statements by the accused, see Chapters 9 and 11.

78 Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure’ (n 18), at 526-30.

79 Interview with ICTR Judge Erik Møse, ICTR-PJ/04, Arusha, 20 May 2008, at 12 (‘It has happened that we allowed the prosecution to lead its last witnesses during the Defence segment, but always before the Defence opening statement. Theoretically, if a Defence witness were terribly ill and about to die, and the parties agreed to hear him during the Prosecution case, perhaps it could be argued that we should change the order, but this has never happened.’). See also May and Wierda, International Criminal Evidence (n 65), at 145.

80 Decision on the Prosecution’s Appeal Against the Trial Chamber’s Order to Call Alibi Rebuttal Evidence During the Prosecution’s Case-in-Chief, Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-AR73.1, AC, ICTY, 16 October 2008 (‘Lukić and Lukić rebuttal appeal decision’), paras 22-3 (‘the Trial Chamber did not advance any reasons as to why interests of justice would require the Prosecution to produce evidence related to an alleged alibi during its case in chief.’).
completed for every accused rather than taking place for each accused consecutively. In Čelebići, the first accused Zejnil Delalić moved the Chamber, at the close of his evidence and before the bulk of evidence for his co-accused cases was heard, to order the prosecution to indicate its intention to call rebuttal evidence against him. So he could decide whether to call evidence in rejoinder, the Chamber could order evidence (if any) in regard of the first accused, and before the bulk of evidence for his co-accused cases was heard, to order the prosecution to present final arguments and the Chamber could proceed to the final determination of charges against the first accused.\textsuperscript{83} Effectively, this would mean severance of his case, but the request specifically did not amount to the request for separate trial of persons accused and tried jointly. However, the Trial Chamber agreed with the prosecution that the possibility of calling rebuttal evidence, along with evidence in rejoinder and for the Chamber’s \textit{proprio motu} evidence, ‘is better considered when all the accused persons have closed their cases, which signifies the close of the overall Defence case’.\textsuperscript{82} In the Chamber’s opinion, the approach proposed by the accused, if followed, would generate the very problems joint trials were meant to address, namely the risk of unnecessary multiplication of evidence and repetition resulting in significant and avoidable delay in trial. Otherwise, of the solution proposed by the accused were to be accepted, the same witnesses could be called in rebuttal against several accused and would have to be recalled as many times as there were accused in the case.\textsuperscript{83}

\textbf{B. Evidence for the prosecution and evidence for the defence (cases in chief)}

The first round in the presentation order at the \textit{ad hoc} tribunals and the SCSL comprises two distinct phases: the prosecution evidence and the defence evidence. Like in the national context, this order is justified by the imposition of the burden of proof on the prosecutor and by the presumption of innocence.\textsuperscript{84} Before the defence is in a position to present its evidence, the prosecution should state the case against the accused in its entirety. As repeatedly maintained by the tribunals, the prosecutor must ‘adduce all evidence critical to the proving of the guilt of the accused by the close of its case’.\textsuperscript{85} So the accused will be put on notice regarding the nature of the case against him and to counter the allegations in the defence case-in-chief.\textsuperscript{86} This entails the requirement that case-in-chief must be as complete

\textsuperscript{83} Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges against Him, \textit{Prosecutor v. Delalić et al.}, Case No. IT-96-21, TC, ICTY, 1 July 1998, para. 4.

\textsuperscript{84} \textit{Ibid.}, para. 47.

\textsuperscript{85} \textit{Ibid.}

\textsuperscript{86} Cf. Loh, \textit{Social Research in the Judicial Process} (n 7), at 481 (‘The rationale for the prescribed (gross) order of presentation of evidence is based in part on the allocation and quantum of the burden of proof’).

\textsuperscript{82} \textit{Delalić et al.} reopening decision (n 71), para. 18.

\textsuperscript{83} \textit{Ibid.,} para. 47.

\textsuperscript{84} Decision on the Prosecution’s Alternative Request to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 \textit{bis} in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose, \textit{Prosecutor v. Blagojević and Jokić}, Case No. IT-02-60-T, TC, ICTY, 13 September 2004 (‘Blagojević and Jokić rebuttal and reopening decision’), para. 6; Decision on Prosecution Motion to Call Rebuttal Evidence, \textit{Prosecutor v. Halilović}, Case No. IT-01-48-T, TC I, Section A, ICTY, 21 July 2005 (‘Halilović decision on rebuttal’); Transcript, \textit{Prosecutor v. Hadžihasanović and Kubura}, Case No. IT-01-47-T, TC II, ICTY, 29 November 2004, at 1254 (‘there is a principle which is fundamental and which must be respected by the Prosecution, and that is that the Prosecution must present all its evidence in the course of its case’); \textit{Prlić et al.} documents in cross-examination appeal decision (n 74), para. 23; Decision on the Prosecution’s Appeal against the Trial Chamber’s Order to call Rebuttal Evidence During the Prosecution’s Case in Chief, \textit{Prosecutor v. Lukić and Lukić}, Case No. IT-98-321-AR73.1, AC, ICTY, 16
as is necessary for the material prosecution evidence to be presented in full, as well as the corresponding prosecution duty to lead all crucial evidence in the first round of presentation. These requirements are formal grounds for the Chamber to restrict the scope of evidence to be led later in the proceedings by finding it inadmissible at that stage. The exceptions are evidence in rebuttal, the earlier unavailable ‘fresh’ evidence for the purpose of reopening the case, and the ‘fresh’ prosecution evidence introduced through cross-examination of defence witnesses.

As noted, the parties at the ICTY, ICTR, and SCSL have autonomy in selecting the best evidence in support of their cases and organizing their case in court in the way they see fit. They are free to define the subjects they wish to address with the witnesses. The right to lead evidence is, however, subject to the requirements of admissibility and relevance of the evidence to the charges. The autonomy is further qualified by the pre-trial judicial orders issued for the management of the case, including the relevant times limits and, in case of ICTY and SCSL, indication of crime sites or incidents on which evidence can be led. Judicial decisions taken during the pre-trial could have the effect of precluding the parties from calling certain witnesses and redefine what evidence is relevant, thereby affecting the scope of case-in-chief.

The Chamber may authorize variation of witness lists in the interests of justice and allow the party to call additional witnesses. But the party intending to do so has to show good cause and provide reasons why such evidence has become necessary. The prosecution may not be allowed to ambush the defence by calling additional witnesses whose testimony was foreseeably required prior to the commencement of the trial and who were accessible to the prosecution. In exercising its discretion to vary a witness list under the ‘interests of justice’ test, the Chambers are guided by the goal of facilitating truth-

October 2008, para. 11; Decision on Defence Motion for Leave to Call Rejoinder Witnesses, Prosecutor v. Semanza, Case No. ICTR-97-20-T, TC III, ICTR, 30 April 2002 (‘Semanza rejoinder decision’), para. 4 (‘the Prosecution must introduce all of the evidence that it intends to rely on to establish its case before the defendant is required to respond. The accused is entitled to know the entire prosecution case before being called upon to defend against it. This order of presentation of evidence protects the accused’s rights to full answer and defence and against self-incrimination.’); Decision on Confidential Motion to Call Evidence in Rebuttal, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, TC II, SCSL, 14 November 2006 (‘Brima et al. rebuttal decision’), para. 42 (‘the Prosecution is under a duty to lead all evidence critical to proving the guilt of an accused in its case-in-chief’); Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination, Prosecutor v. Taylor, Case No. SCSL-03-1-T, TC II, SCSL, 30 November 2009 (‘Taylor cross-examination decision’), para. 24.

87 Delalić et al. reopening decision (n 71), para. 18 (‘The Prosecution may also introduce such evidence [probative of the Accused’s guilt] through the cross-examination of the accused.’); Prlić et al. documents in cross-examination trial decision (n 74), paras 17-8; Taylor additional witnesses decision (n 74), para. 7. In detail, see infra 3.2.1.C., 3.2.1.G., and infra n 181.
88 E.g. Prlić et al. documents in cross-examination trial decision (n 74), para. 16; Decision on Prosecution’s Motion to Vary its Rule 65 ter Witness List, Prosecutor v. Halilović, Case No. IT-01-48-T, TC I Section A, ICTY, 7 February 2005 (‘Halilović variation decision’), at 6 (‘in principle it is for each Party to decide which witnesses to call to prove its case’).
89 Rule 89(C) and (D) ICTY and ICTR; Rule 89(C) SCSL RPE.
90 Supra n 63. See e.g. Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, Prosecutor v. Prlić et al., Case No. IT-04-74-PT, TC II, 28 April 2006 (‘Prlić et al. guidelines’), para. 4.
91 For more detail on the applicable standard, see Chapter 8. See e.g. Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73bis (E), Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC, ICTR, 26 June 2003 (‘Bagosora et al. Rule 73bis(E) decision’), para. 13.
92 Decision on Confidential Motion to Seek Leave to Call Additional Witnesses, Prosecutor v. Delalić et al., Case No. IT-96-21, TC II quater, ICTY, 4 September 1997 (‘Delalić et al. additional witnesses decision’), para. 10.
93 Delalić et al. additional witnesses decision (n 92), para. 10.
finding within an adversarial setting, which allows room for reasonable flexibility. As part of that evaluation, the Chambers will consider the importance of the proposed testimony, the complexity of the case, and prejudice for the defence, due to the element of surprise, the need for additional investigations, and additional or replacement witnesses.

Similarly, the parties have relative freedom in deciding on the appropriate order of appearances of witnesses in their case in light of the chosen case strategy. However, Trial Chambers have been asserting powers to exercise some form of control in this regard as well. Judges have developed a practice according to which each party is required to provide the other party and the Chamber with an indication of the order of witnesses due to testify and the scheduled date of their appearance for the forthcoming period. The parties were also expected to notify of any changes to the calling order several days in advance and file a list of documents to be used at examination-in-chief.

The scope and content of the case-in-chief depend on what facts are sought to be proved and may vary by party. The objective of the prosecution case-in-chief is to satisfy the Trial Chamber that the accused has a ‘case to answer’, which the Chamber determines in the procedure for the judgment of acquittal at the close of the prosecution case. At the ICTY, ICTR, and SCSL, ‘no case to answer’ procedure formalizes the division between the ‘prosecution case’ and the ‘defence case’. In his case, the prosecution is expected to present sufficient evidence to sustain conviction on one or more counts charged in the indictment, failing which an acquittal on the counts concerned shall be entered.

Case-in-chief presents an opportunity to the prosecutor to tender proof that addresses defences and issues raised in the defence’s pre-trial brief which the OTP can reasonably anticipate to be presented as part of defence case. The duty to anticipate the defence evidence derives from the rule that the prosecutor may not count on the opportunity to lead evidence in rebuttal unless it goes to issues arising directly from the defence case that could not have been ‘reasonably anticipated’. So long as the relevant issue arises from the defence pre-trial brief, the prosecution should deal with it in its case-in-chief, if at all. This requirement is not straightforward because the defence pre-trial brief may be not detailed and the final shape given to the defence case, as actually presented, may diverge considerably from pre-trial notice of alibi and defences. Prior to the defence phase, the prosecutor may be unable to infer from the pre-trial notice the full details of the defence case, but perhaps only some particulars. On the issue of the prosecution duty to lead evidence rebutting alibi during its case-in-chief, the ICTY Appeals Chamber held that the distinction is to be drawn between the evidence supporting the prosecution’s own case that

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94 Ibid., para. 7 (‘The Trial Chamber is enjoined to utilise all its powers to facilitate the truth finding process in the impartial adjudication of the matter between the parties. It is thus important to adopt a flexible approach when considering the management of witnesses. Where the testimony of a witness is important to the Prosecution or the Defence, the Trial Chamber will ensure that such witness is heard’).
95 E.g. Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File Another Rule 98bis Motion, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC I, ICTR, 19 April 2008, para. 10; Bagosora et al. Rule 73bis(E) decision (n 91), para. 14.
98 Rule 98bis ICTY and ICTR RPE; Rule 98 SCSL RPE. See infra 3.2.4.
99 Rules 65ter (F) and 67(B) ICTY RPE; Rules 67a(ii) and (C) and 73bis(F) ICTR RPE; Rules 67(A)(ii) and (C) and 73bis(F) SCSL RPE.
100 See infra 3.2.1.C.
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must be led during case-in-chief, on the one hand, and the evidence rebutting issues arising from the defence case, which should be led in rebuttal, on the other hand.\textsuperscript{101} By contrast, the defence’s case-in-chief normally includes evidence meant to raise a reasonable doubt as to the guilt of the accused. It will do so by advancing defences, alleging facts making the prosecution version of events appear incoherent or contradictory, and by challenging the relevance and credibility of prosecution evidence. The defence is relatively free to decide which witnesses and other evidence to present and in what order.\textsuperscript{102} Like with the OTP, this autonomy is qualified by duties of prior notification through disclosure, submission of witnesses and exhibits lists and other information and the respective case-management decisions, as well as compliance with the trial schedule and calling orders. Furthermore, the ability of the defence to put forward its case in full detail may be moderated by the Chamber in the exercise of its trial management power under Rule 90(F).\textsuperscript{103} At the ICTY and ICTR, which follow the unitary trial scheme, the defence case-in-chief will normally not be used to submit information going solely to the determination of the sentence (good character evidence or mitigating circumstances). Withholding such information until the phase designated for that purpose may be preferable for the defence for strategic considerations (at step (vi) or during closing arguments).\textsuperscript{104} However, there will often be a partial overlap between the two categories of evidence, as certain mitigating circumstances may both concern the responsibility of the accused and have bearing on the sentence.

C. Prosecution evidence in rebuttal

After the defence concludes the presentation of its cases, a second round of evidentiary presentations may be allowed, consisting of rebuttal evidence of the prosecution and rejoinder evidence of the defence. In this round, the parties’ autonomy in submitting evidence is narrower and subject to stricter requirements than those applied at the case-in-chief phase. Rebuttal (and rejoinder) evidence may not be presented as of right but only upon the determination of admissibility made considering the more advanced procedural phase.\textsuperscript{105} As indicated above, rebuttal evidence under Rule 85(A)(iii) is one exception to the principle that the accused must be given an opportunity to respond to the entirety of allegations and evidence against him.\textsuperscript{106} At the SCSL, the position that the presentation of

\textsuperscript{101} Lukić and Lukić rebuttal appeal decision (n 80), paras 11 (‘While the Prosecution’s obligation to prove its case in chief is closely related to its interest in eliminating the reasonable likelihood that an alibi is true, … these two objectives have to be distinguished. As a general rule, the Prosecution must present the evidence in support of its case during its case in chief. In contrast, whether evidence is brought to specifically counter an alibi will depend on the Prosecution’s strategy.’) and 23-24 (Rule 67(B)(i)(a) obliging the defence to notify the prosecution of its intent to offer alibi evidence does not change the nature of alibi rebuttal evidence and has no impact on the proper timing of presentation of such evidence).

\textsuperscript{102} E.g. Halilović variation decision (n 88), at 6 (‘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’).

\textsuperscript{103} Decision on the Use of Time, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC III, ICTY, 9 October 2006, at 6 (‘it is not always necessary to put the defence case, in all its detail, to each and every witness called by the Prosecution, because such an approach risks being the “needless consumption of time” censured by rule 90(F)(ii)’).

\textsuperscript{104} Rule 85(A)(vi) and 100(A) ICTY and ICTR RPE; Rule 100 SCSL RPE.

\textsuperscript{105} Decisions on Defence Motions for Rejoinder, Prosecutor v. Kunarac et al., Case No. IT-96-23 & 23/1, TC II, ICTY, 31 October 2000 (‘The OTP has no absolute entitlement to lead evidence in rebuttal merely because of Rule 85(A)(iii). Rule 85(A)(iii) does not deal with her entitlement; it merely deals with the order in which evidence is given where an entitlement to lead such evidence exists. It is the same with evidence in rejoinder and Rule 85(A)(iv):’).

\textsuperscript{106} Delalić et al. reopening decision (n 71), paras 18 and 22: Decision on Motion to Reopen Prosecution Case, Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T, TC II, ICTY, 23 February 2007 (‘Mrkšić et al. reopening
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rebuttal evidence is not an unconditional right is attested by the explicit requirement of obtaining leave of the Chamber.\(^{107}\) In practice, the lack of such requirement from the ICTY and ICTR RPE has not resulted in a different approach. In practice, the prosecutors there must also obtain the Chamber’s permission, as a prerequisite for presenting rebuttal evidence.\(^{108}\)

The ICTY Appeals Chamber established in Čelebići that ‘rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated’.\(^{109}\) This test has been applied in both the ICTR and SCSL.\(^{110}\) In light of this standard, the prosecution is precluded from seeking admission of a vast quantity of evidence.\(^{111}\) The rebuttal opportunity ‘must not be construed as a carte blanche for the Prosecution to adduce evidence at a later stage in the proceedings which should properly have been presented as part of its original case’.\(^{112}\) A failure to lead evidence during the case-in-chief on the matter critical to the prosecution case that has not arisen for the first time out of the defence case cannot be compensated for by submitting that evidence in rebuttal.\(^{113}\) Rebuttal may not be used to reinforce the evidence or fill the gaps in the prosecution’s case-in-chief, by calling evidence that has been available but deemed unnecessary, only because the prosecution case has been contradicted by some defence evidence.\(^{114}\)

In Kunarac et al., the Trial Chamber allowed the prosecution to recall its witnesses in rebuttal of the defence evidence attributing to them certain specific actions and statements that could affect their credibility, given that the proposed witnesses had not had an opportunity to respond to those allegations during cross-examination in the prosecution case-in-chief.\(^{115}\) Similarly, the ICTR held that the submission of rebuttal evidence to refute alibi would be warranted if the defence had failed to give a timely notice of alibi and—since

\(^{107}\) Rule 85(A)(iii) SCSL RPE. See Brima et al. rebuttal decision (n 86), para. 31 (‘Rule 85(A) does not create any entitlement for the Prosecution to present evidence in rebuttal’ and that ‘the Trial Chamber has a wide discretion to limit or preclude the presentation of rebuttal evidence’).

\(^{108}\) E.g. Decision on the Prosecutor’s Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73, and 85 (A) (iii)…, Prosecutor v. Ntagerura et al., Case ICTR-99-46-T, TC III, ICTR, 21 May 2003 (‘Ntagerura et al. rebuttal decision’), para. 31 (‘In determining the propriety of granting leave to call rebuttal evidence, the Chamber enjoys wide discretion to limit or preclude the presentation of rebuttal in order to insure that the trial proceeds expeditiously, without unfairness and needless consumption of time’).

\(^{109}\) Delalić et al. appeal judgement (n 86), para. 273. See also Delalić et al. reopening decision (n 71), para. 23; Decision of 9 May 2003 on the Prosecutor’s Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, TC I, ICTR, 13 May 2003 (‘Nahimana et al. rebuttal decision’), para. 47.

\(^{110}\) E.g. Semanza rejoinder decision (n 86), paras 5 and 8 (‘Rebuttal is not permitted to merely confirm or reinforce the Prosecutor’s case, or to deal with collateral issues. Rebuttal is permitted when it is necessary to ensure that each party has an opportunity to address issues central to the case’); Brima et al. rebuttal decision (n 86), para. 32.

\(^{111}\) Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević…, Prosecutor v. S. Milošević, Case No. IT-02-54-T, TC, ICTY, 17 May 2005 (‘S. Milošević decision on reconsideration’), para. 13.

\(^{112}\) Delalić et al. reopening decision (n 71), para. 22.

\(^{113}\) Halilović decision on rebuttal (n 86) (denying admission of a witness statement proposed by the prosecution in rebuttal given the prior notice of the relevant issue by the defence as part of the defence pre-trial brief and in cross-examination).

\(^{114}\) Delalić et al. reopening decision (n 71), paras 18 and 23; Delalić et al. appeal judgement (n 86), paras 273 and 275; Halilović decision on rebuttal (n 86); Nahimana et al. rebuttal decision (n 109), para. 47; Ntagerura et al. rebuttal decision (n 108), para. 32; Brima et al. rebuttal decision (n 86), para. 33.

\(^{115}\) Decision on Rebuttal Case, Prosecutor v. Kunarac et al., Case No. IT-96-23 & 23/1, TC II, ICTY, 28 September 2000, paras 9-11. Cf. Nahimana et al. rebuttal decision (n 109), para. 51 and Ntagerura et al. rebuttal decision (n 108), para. 33 (proposed rebuttal evidence on the credibility of witnesses and ‘other collateral matters’ subject to exclusion).
such failure does not preclude it from relying on alibi at trial—has led the respective evidence during its case on the matters the prosecutor could not have reasonably foreseen.116 As a matter of fairness towards the prosecution, the Trial Chamber should grant it leave to lead evidence in rebuttal of alibi, being a key issue arising for the first time during the defence case. The AFRC Chamber refused to allow the prosecutor to submit rebuttal evidence to refute Brima’s alibi: the notice thereof alibi had been given by the defence in its pre-trial brief and during the presentation of the prosecution case-in-chief.117

The jurisprudence of the tribunals has recognized the common-law origin of the device of rebuttal and has relied upon that legal tradition in distilling its nature and rationale.118 Understandably, in the interpretation and application of the rules governing the admission of rebuttal evidence, the Trial Chambers have also been guided by common law practice.119 For example, the ICTR deemed applicable before it the principle that ‘reasonable diligence’ attending inability by the prosecutor to foresee an issue that arose directly from the defence case-in-chief cannot be established where there have been ‘pre-trial warnings of evidence likely to be given which calls for denial beforehand’ as well as by ‘suggestions put in cross-examination’, as opposed to ‘fanciful and unreal statements no matter from what source they emanate’.120

Besides the requirement that the proposed rebuttal evidence must address unforeseen issues arising ex improviso from the defence case-in-chief, such evidence must also satisfy the elevated threshold for admission. It is higher for rebuttal evidence because of the possible prejudice to the accused and the need to ensure that the probative value of the proposed evidence is not substantially outweighed by the need to ensure a fair trial.121 Two key factors are regarded relevant for the Chamber’s determination of whether it should exercise its discretion to admit rebuttal evidence: (i) whether the evidence is of ‘high probative value’, ‘significant’, to the extent that ‘the injustice of rejecting it should be irresistible’, and not merely circumstantial, corroborative or reinforcing the prosecution case-in-chief;122 and (ii) the advanced stage of trial and any possible delays in the proceedings, in light of the right to be tried without undue delay and judicial economy.123 At the same time, the Chambers deemed it relevant whether the evidence sought to be introduced in rebuttal is in itself probative of the guilt of the accused and relates to a ‘fundamental part of the case that the Prosecution is required to prove in relation to the

116 Semanza rebuttal decision (n 76), paras 8-10; Nahimana et al. rebuttal decision (n 109), para. 42.
117 Brima et al. rebuttal decision (n 86), para. 37-43.
118 E.g. Semanza rebuttal decision (n 76), para. 8; Ntagerura et al. rebuttal decision (n 108), paras 32 (noting that “within common law “rebuttal” evidence denotes evidence introduced by the prosecution to explain, repel, counteract, or disprove testimony or facts introduced by the defence for the first time its case-in-chief”).
119 E.g. Nahimana et al. rebuttal decision (n 109), para. 50 and nn16-20 (with references to Archbold: Criminal Pleading, Evidence and Practice 2000 and English case law).
120 Ibid., paras 50 (referring to R. v. Hutchinson (1985), 82 Cr. App. R. 51 at 29, CA) and 59 (the TC declining to call a rebuttal witness due to the prosecution’s awareness of the matter as it had arisen from the defence’s cross-examination).
121 Rule 89(D) ICTY and ICTR RPE.
122 Delalić et al. reopening decision (n 71), paras 34-7; Transcript, Prosecutor v. Kordić and Ćerkez, Case No. IT-94-14/2, TC, ICTY, 18 October 2000, at 26647 (‘only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted’); Decision on Rebuttal Evidence, Prosecutor v. Galić, Case No. IT-98-29-T, TC I, ICTY, 2 April 2003 (‘Galić rebuttal decision’), paras 4 (‘This test precludes from being admitted in rebuttal evidence of low probative value, evidence merely reinforcing the Prosecution case-in-chief, or evidence relating to a fundamental part of the Prosecution’s case-in-chief and only presented at this stage of the trial’, footnote omitted) and 7; Semanza rebuttal decision (n 76), para. 8; Nahimana et al. rebuttal decision (n 109), paras 44 and 46; Ntagerura et al. rebuttal decision (n 108), para. 32.
123 E.g. Decision on the Prosecution Motion to Recall Witness Nyanjwa, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 29 September 2004 (‘Bagosora et al. witness recall decision’), para. 6 and n4 (observing the similarity of inquiry into ‘good cause’ when determining whether a party can present rebuttal and to recall and add witnesses).
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124 Such evidence must be brought in the case-in-chief rather than in the rebuttal because, if admitted at a late stage it may result in a material prejudice.125

The prosecutor as a moving party bears the burden of establishing, first, the ex improviso nature of issues arising from the defence case-in-chief that could not have been anticipated in the exercise of reasonable diligence, and second, the high probative value of proposed rebuttal evidence and its relevance to central issues in the prosecution case-in-chief.126 As the proponent for rebuttal, the prosecutor is under a duty to provide the Chamber with a detailed motivation corroborated by citations of the trial record or the indictment.127

Given that the two requirements (ex improviso character and admissibility of the proposed evidence) are cumulative, the principle of judicial economy exempts the Chamber from determining its probative value where the prosecutor has failed to establish the ex improviso character of the defence evidence to be rebutted, or to consider whether the said defence evidence is ‘new’ where the proposed rebuttal evidence is not capable of refuting such evidence.128 Yet, some Chambers have looked at the probative value of the proposed rebuttal evidence in any event, even upon a finding that the prosecutor had not satisfied the Chamber of the ‘ex improviso’ prong.129

Specific rules apply in situations in which the party requests to re-call a witness, whose evidence has been completed, in rebuttal (or in rejoinder). For example, the need to recall a witness may arise whenever a party wishes to respond to the other party’s evidence where the latter party has failed to properly contest the testimony of the said witness when he originally testified and to put to him the nature of the contradictory evidence, in violation of ICTY Rule 90(H)(ii) or ICTR Rule 90(G)(ii), but subsequently led such evidence as part of its own case.130

The fact that the same witness is called again after he or she has appeared before the Chamber, due to the party’s omission to elicit the needed evidence at first appearance, calls for the application of a stricter standard for admission. The standard for recalling witness is that the moving party must demonstrate ‘good cause’, which is defined generally as ‘a substantial reason amounting in law to a legal excuse for failing’ to adduce the relevant evidence from a witnesses at the previous occasion.131 In assessing ‘good cause’, the

124 Brima et al. rebuttal decision (n 86), para. 34.
125 Nahimana et al. rebuttal decision (n 109), paras 47-8 and 60-1 (declining to admit rebuttal evidence because it ‘would be so prejudicial to the Accused at this late stage of the case that it outweighs the unfairness to the Prosecution of not being able to rebut the alibi evidence. The evidence is relevant to the Prosecution case and should have been led in evidence in the presentation of the Prosecution. If such evidence were presented at this stage it would be tantamount to the Prosecution reopening its case.’). See also Ntagerura et al. rebuttal decision (n 108), paras 33 and 38 (’To permit the Prosecutor to supplement evidence she should have presented in her case-in-chief would be to violate one of the cardinal precepts preventing the prosecutor from splitting her proofs and condone the practice of presenting cases piecemeal for the Defence to answer.’); Brima et al. rebuttal decision (n 86), para. 98.
126 Ntagerura et al. rebuttal decision (n 108), para. 34; Brima et al. rebuttal decision (n 86), para. 34.
127 Ntagerura et al. rebuttal decision (n 108), para. 35.
128 Decision on the Prosecution Motion for Leave to Call Rebuttal Evidence, Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, TC II, ICTR, 12 May 2003, para. 26 (stating that two criteria are cumulative and recognizing that the decision ‘really turns on the second condition—that is, whether the Prosecution has demonstrated that the proposed testimony of the listed witnesses directly attacks the fabric of the Defence alibi evidence’).
129 E.g. Ntagerura et al. rebuttal decision (n 108), para. 39; Brima et al. rebuttal decision (n 86), paras 44 et seq. (finding that proposed evidence in rebuttal such as meant to refute an alibi has no ‘significant probative value’ and is inadmissible, insofar as it addresses matters covered in the case-in-chief).
130 See infra 3.2.2.C. Another example when recall of a witness may be necessary is when the defence wishes to have the prosecution witness appear as part of its evidence, after some unanticipated matters arose from the prosecution evidence led subsequently on which the defence could not have reasonably been expected to cross-examine that witness at first appearance.
131 Decision on the Defence Motion for the Re-Examination of Defence Witness DE (TC), Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, TC II, ICTR, 19 August 1998 (‘Kayishema and Ruzindana re-examination decision’), para. 14; Bagosora et al. witness recall decision (n 123), para. 6; Decision on
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Chamber must consider: (i) the purpose of the proposed testimony; and (ii) the justification for not offering such evidence when witness originally testified.\textsuperscript{132} In view of the right of the accused to be tried without undue delay and out of concerns of judicial economy, recall should not be granted except in most compelling of circumstances where the evidence is of significant probative value and not cumulative.\textsuperscript{133} For example, this standard would be satisfied if the proposed evidence seeks to explore inconsistencies between the original testimony and the subsequently obtained declaration, provided that the inability to put those inconsistencies to the witness would amount to prejudice and the inconsistencies are not minor.\textsuperscript{134}

D. Defence evidence in rejoinder

ICTY and ICTR Rule 85(A)(iv) envisages the defence’s evidence in rejoinder as the fourth step in the order of presentation of evidence.\textsuperscript{135} Like rebuttal, rejoinder is not an absolute entitlement of the party, i.e. the accused.\textsuperscript{136} Rule 85(A)(iv) establishes when such evidence is to be submitted, when the Chamber has allowed it, and does not provide for the unconditional right to do so. Only where the prosecutor raises new matters in its rebuttal evidence that could not have reasonably been anticipated, may the defence respond by submitting evidence in rejoinder.\textsuperscript{137} Rejoinder is governed by the rules applicable in the

\textsuperscript{132} Bagosora et al. witness recall decision (n 123), para. 6; Nyiramasuhuko et al. witness recall decision (n 131), para. 26; Decision on Joseph Nzirorera’s Motion to Recall Ahmed Mbonyunkiza (TC), Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC, ICTR, 25 September 2007, para. 5; Nzabonimana witness recall decision (n 131), para. 11; Decision on Kanyabashi’s Motion to Re-open his Case and to Recall Prosecution Witness QA, Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T (Joint Case No. ICTR-98-42-T), TC II, ICTR, 2 July 2008 (‘Kanyabashi witness recall decision’), para. 33; Decision on Prosper Mugiraneza’s Emergency Motion to Recall Witnesses for Further Testimony, Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, TC II, ICTR, 5 June 2008 (‘Bizimungu et al. witnesses recall decision’), para. 9.

\textsuperscript{133} Bagosora et al. witness recall decision (n 123), paras 6-7 (finding no good cause to recall a handwriting expert given that the proposed additional evidence is cumulative, solely aiming to address defence questions asked at cross-examination rather than to respond to any evidence presented, so it ‘does not materially or significantly advance any aspect of the prosecution’s case beyond his initial assessment’); Nyiramasuhuko et al. witness recall decision (n 131), para. 26; Kanyabashi witness recall decision (n 132), para. 33; Nzabonimana witness recall decision (n 131), para. 11; Decision on Joint Defence Motion for Leave to Recall Witness TF1-023, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, TC II, SCSL, 25 October 2005, paras 15 and 16.

\textsuperscript{134} Nyiramasuhuko et al. witness recall decision (n 131), para. 26; Decision on Joseph Nzirorera’s Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera’s Motion to Recall the Witness (TC), Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC, ICTR, 4 March 2008, para. 30; Bizimungu et al. witnesses recall decision (n 132), paras 9-10.

\textsuperscript{135} Cf. Rule 85(A) SCSL RPE (envisaging no such step).

\textsuperscript{136} Decision on Defence Motions on Rejoinder, Prosecutor v. Kunarac et al., Case Nos IT-96-23-T and IT-96-23/1-T, TC, ICTY, 21 October 2000 (‘Kunarac et al. rejoinder decision’); Decision on Joint Defence Motion to Admit Rejoinder Statement Via Rule 92bis, Prosecutor v. Limaj et al., Case No. IT-03-66-T, TC II, ICTY, 18 July 2005 (‘Limaj et al. rejoinder decision’).

\textsuperscript{137} Delalić et al. reopening decision (n 71), para. 24; Kunarac et al. rejoinder decision (n 136); Decision on the Admission of Exhibits Tendered During the Rejoinder Case, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, TC, ICTY, 23 October 2002 (‘Naletilić and Martinović rejoinder exhibits decision’) (‘an entitlement to lead evidence in rejoinder arises only if the Prosecution raises new issues during its case in rebuttal’); Decision on Rejoinder Evidence, Prosecutor v. Galić, Case No. IT-98-29-T, TC, ICTY, 2 April 2003; Decision III on the Admissibility of Certain Documents Prosecutor v. Strugar, Case No. IT-01-42-T, TC, ICTY, 10 September 2004, para 5; Limaj et al. rejoinder decision (n 136); Semanza rejoinder decision (n
context of rebuttal mutatis mutandis. As opposed to revising the defence case as a whole, it must be confined to evidence contradicting matters arising from prosecution evidence submitted in rebuttal. The defence may only obtain leave to lead evidence in rejoinder in order to refute a particular piece of rebuttal evidence.

E. Evidence ordered by the Chamber

The fifth step in the ‘presentation of evidence’ sequence at the ICTY and ICTR (and the fourth at the SCSL) is reserved for evidence ordered by the Trial Chamber. In a departure from the overall ‘adversarial’ tenor of the presentation order at the ad hoc tribunals, ICTY and ICTR Rule 98 provides for the power of the judges to order either party to produce additional evidence and to proprio motu summon witnesses and order their attendance. While the ‘Chamber evidence’ phase is envisaged for the SCSL, the underlying judicial power is not explicitly envisaged, although it is implied in SCSL Rule 85(A)(iv).

In the ICTY’s early days, this power was referred to as one of the ‘three important deviations from some adversarial systems’, which served to ensure that, in the best interests of international justice, the Tribunal is ‘fully satisfied with the evidence on which its final decisions are based’. The insertion of an explicit ex officio fact-finding power in the Rules does not per se entail that in practice the judges have always taken a pro-active approach in this respect rather than contenting themselves with the evidence presented by the parties. This power is discretionary, as widely admitted in jurisprudence. This means that parties are not entitled to the evidence being called by the Chamber pursuant to Rule 98 and may not rely upon that Rule to bring the evidence before the Tribunal as a matter of right.

The ‘adversarial’ layout and logic of the evidentiary process, whereby the parties rather than the judges take the lead in unearthing, preparing, and submitting evidence, has rendered this judicial power an extrema ratio tool. As the Milutinović et al. Trial Chamber stated,

While Judges have authority to order parties to produce additional evidence, and themselves summon witnesses, this power can be exercised by Trial Chambers to only a limited extent in the absence of an investigative arm under their control. It is where the Chamber is of the view that issues raised by the parties could be productively explored by examining a witness not called by the parties that such power is likely to be used. It is highly unlikely that such an exercise would ever provide the principal foundation for the most significant findings in any prosecution before this Tribunal. As it is, the findings in this Judgement are based almost exclusively on the evidence the parties have chosen to present to the Chamber.

The Chambers have acknowledged that in the adversarial framework, the parties and the Chamber may pursue different interests. It may be not in the partisan interests to call a certain witness that the Chamber might regard as material for the establishment of the truth.

86), paras 6 and 8 (‘in principle, rejoinder should only be permitted in relation to unanticipated issues newly raised in rebuttal’).

138 Delalić et al. reopening decision (n 71), para. 24.

139 Ibid., para. 6.

140 Rule 85(A)(v) ICTY and ICTR RPE; Rule 85(A)(iv) SCSL RPE.


142 Decision on Defence Motion for Orders Calling Prosecution Witness VZ listed in Prosecution Witness List of November 2000, Prosecutor v. Semanza, Case No. ICTR-97-20-T, TC III, ICTR, 6 September 2001, para. 6; Decision on Defence Motion for Additional Disclosure (Rule 98), Prosecutor v. Karera, Case No. ICTR-01-74-T, TC I, ICTR, 1 September 2006, paras 5 and 7. See also Decision on Defence Motion for Subpoenas to Prosecution Witnesses, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC III, ICTR, 10 May 2007, para. 15.

143 Judgement, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC I, ICTY, 26 February 2009 (‘Milutinović et al. trial judgement’), para. 33.
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Not calling such a witness would be ‘inexcusable’ for the Chamber.\textsuperscript{144} The removal of a witness from the witness list of a party does not preclude the Chamber from exercising its \textit{proprio motu} power under Rule 98 with respect to that witness.\textsuperscript{145} While the judicial power bears a significant truth-finding potential, it may come in tension with the basic tenets of a party-driven process, which may explain a fairly limited invocation of this power in practice. For example, when calling a witness it deems material to the case pursuant to Rule 98, the Chamber may not know that the prosecutor has not called that witness namely because he or she is a suspect against whom the indictment is being prepared, as a result of which the prosecutor was prevented from questioning that witness.\textsuperscript{146}

The ICTY and ICTR judges have not used this power as regularly as their counterparts in almost any civil law system would.\textsuperscript{147} But it cannot be said that Rule 98 has remained a ‘dead letter’. Particularly at the ICTY, Trial Chambers have ordered parties to submit evidence and called witnesses \textit{proprio motu} in a range of cases.\textsuperscript{148} Some of those cases involved the appointment of an independent Chamber expert where the forensic opinions of the handwriting experts called by the parties clashed, in order to assist the Chamber with the evaluation of the documents.\textsuperscript{149} Furthermore, as a way to reduce risks to the safety of witnesses and to avoid ostracism in their respective communities as a result of association with one of the parties, witnesses may also prefer to appear as Chamber witnesses rather than witnesses for the party. In that case, the Chamber may issue summonses upon a party’s request.\textsuperscript{150}

The sequence of evidence presentation foreseen in Rule 85 and, in particular, the placement of the Chamber evidence after the evidence-in-chief, rebuttal and rejoinder, as well as the reference in Rule 98 to additional evidence,\textsuperscript{151} are all indications of the residual function of the \textit{proprio motu} fact-finding power at the \textit{ad hoc} tribunals. The Chamber evidence under Rules 85(A)(v) and 98 is primarily intended to cast light on the issues that remain in need of clarification after the presentation of all evidence by the parties.\textsuperscript{152}

\textsuperscript{144} Reasons for Decision Denying Defence Motion Regarding Chamber witnesses Biljana Plavšić and Branko Derić and Decision on Admission into Evidence of Biljana Plavšić’s Statement and Book Extracts, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-T, TC I, ICTY, 14 August 2006, para. 13.

\textsuperscript{145} Witness Summons by the Chamber Pursuant to Rule 98 of the Rules of Procedure and Evidence, \textit{Prosecutor v. Kupreškić et al.}, Case No. IT-95-16-T, TC II, ICTY, 30 September 1998 (‘Kupreškić et al. witness summons’) (when the prosecution witness failed to appear due to infirmity, the Chamber summoned the witness under Rule 98 as per the defence’s request).


\textsuperscript{147} Cf. \textit{ibid.} (ICTY Judge Patricia Wald (US) considering that this power had been ‘frequently invoked’ at the ICTY).

\textsuperscript{148} See e.g. Judgement, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, TC I, ICTY, 3 March 2000, paras 55-6 (the TC called 8 witnesses); Judgement, \textit{Prosecutor v. Stakić}, Case No. IT-97-24-T, TC II, ICTY, 31 July 2003, paras 13-14, 16 and 551 (the Chamber called 6 witnesses and ordered the Prosecution to appoint 2 experts); Sentencing Judgement, \textit{Prosecutor v. M. Nikolić}, Case No. IT-02-60/1-S, TC I Section A, ICTY, 2 December 2003, para. 25 (the TC called 3 witnesses to testify at the sentencing hearing to assist it in assessing credibility of the accused); Judgement, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-T, TC I, ICTY, 27 September 2006, paras 1204 and 1255-7 (the TC called six additional witnesses); \textit{Milutinović et al.} trial judgement (n 143), para. 31.


\textsuperscript{150} Decision on Defence Motion to Summons Witnesses, \textit{Prosecutor v. Kupreškić et al.}, Case No. IT-95-16-T, TC II, ICTY, 6 October 1998.

\textsuperscript{151} \textit{ibid.}

\textsuperscript{152} Decision on Admission of Material Sought by the Chamber and Other Exhibits, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-T, TC I, ICTY, 14 July 2006, para. 5 (‘A Chamber ... is not limited to calling such evidence early in the case in order to enable the parties to examine witnesses on it. In fact, Chamber evidence will tend to come in towards the end of the case, when the Chamber can more clearly see what further material it needs in order to decide the case.’ Internal references omitted); Decision of Trial Chamber I in respect of the Appearance of General Enver Hadžihasanović, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, TC I, ICTY, 25
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Typically, the Chambers have regarded Rule 98 as giving them the power to order the production of further evidence, or to summon witnesses ex proprio motu ‘should it be faced with a particular problem arising out of the way in which evidence was presented’. In the interests of justice and for the protection of the rights of the accused, this normal course may be departed from so that the defence could benefit from the additional evidence before presenting its case. Finally, as will be shown in due course, the order of examination of Chamber witnesses may depart from the regular order applicable during other steps in the Rule 85(A) sequence.

F. Information relevant to sentencing

As a concluding step in the examination of evidence phase at the ICTY and ICTR, the parties may present ‘any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment’. This step was introduced at the ICTR in June 1998 and then at the ICTY in July 1998 (although amendments were agreed in March 1998). The amendment was a part of the reform at both tribunals merging into one the guilt-determination and sentencing phases, as well as abolishing the sentencing procedure in non-guilty plea cases, in order to expedite the proceedings without jeopardizing the rights of the accused.

In the trial completed before the summer 1998 amendment of the Rules, the evidence relevant for the determination of an appropriate sentence was presented during a separate sentencing hearing in accordance with Rule 100. Such hearings were to be held not only in cases of guilty pleas but also in contested cases resulting in a guilty verdict, in accordance with the ‘pre-sentencing procedure’ envisaged for both categories of cases. For example, the first ICTY cases, Tadić and Erdemović, were disposed of under a bifurcate scheme (the latter case in the wake of the guilty plea). Moreover, the Tadić Trial Chamber distinguished between the evidence as to the guilt of the accused and the information relevant to sentencing, which it disallowed to present at trial, and the evidence as to the guilt, which

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March 1999 (‘Blaškić witness Hadžihasanović decision’), at 2 and, in the same case, Decision of Trial Chamber I in Respect of the Appearance of General Philippe Thébault, 25 March 1999, at 2 and Decision of Trial Chamber I in Respect of the Appearance of Mr. Jean-Pierre Thébault, 25 March 1999, at 2; Decision of Trial Chamber I to Call Colonel Amir Kubura as a Witness of the Trial Chamber, 21 May 1999, Decision of Trial Chamber I Summoning Mr. Robert Stewart as a Witness of the Trial Chamber, 19 May 1999 (considering the calling of the named witness after the hearing main Prosecution and Defence witnesses ‘absolutely necessary’ ‘in order to ascertain the truth in respect of the crimes’).

S. Milošević decision on reconsideration (n 111), para. 14.


See infra 3.2.2.A.

Rule 85(A)(vi) ICTY and ICTR RPE.

See Rule 85(A)(vi) ICTR RPE (as amended at the 5th plenary session (1-8 June 1998)); Third Annual Report of the ICTR, UN Doc. A/53/429-S/1998/857, 23 September 1998, para. 15 (mentioning ‘the decision to combine into a single procedure the trial phase and the sentencing phase’ among ‘substantial amendments to the Rule, with a view to expediting proceedings before [the ICTR]’). See also Rule 85(A)(vi) ICTY RPE (IT/32/Rev. 13, 10 July 1998) (amendments agreed at the 17th plenary in March 1998 and enacted at the 18th plenary session on 9-10 July 1998); see Fifth Annual Report of the ICTY (n 67), paras 106 and 108 (the aim of the working group presided over by Judge Shahabudeen was ‘to investigate the objective of conducting trials more expeditiously without jeopardizing respect for the rights of accused persons’; some of the amendments adopted at the XVII and XVIII plenary sessions were proposed by this working group).

Rule 100 ICTR RPE (as of 6 June 1997) and Rule 100 ICTY RPE (IT/32/Rev. 12, 12 November 1997) entitled ‘Pre-Sentencing Procedure’ (‘If the accused pleads guilty or if a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.’).
was to be presented at a sentencing hearing.\textsuperscript{159} Similarly, in its first Akayesu case, the ICTR rendered a separate judgement and sentence.\textsuperscript{160}

It appears that the reform was made upon insistence of judges with a civil law background, who persuaded their common law colleagues that in contested trials a merged procedure would be more efficient and appropriate, given the absence of juries.\textsuperscript{161} So judges could deliberate on both matters consecutively without interruption for oral hearings.\textsuperscript{162} The bifurcate scheme of trial remains applicable only in cases of guilty pleas, providing the opportunity to the parties to make tailored sentencing submissions.\textsuperscript{163} In other cases, sentencing matters were to be discussed at the very end of the proof-taking phase pursuant to Rule 85(A)(vi) and during closing arguments.\textsuperscript{164} Moreover, this information can be included in the final trial briefs that are to be filed by the parties some days in advance of the date set for the presentation of their closing arguments.\textsuperscript{165} Ever since, the Trial Chambers received both the evidence on the guilt or innocence of the accused \textit{and} any sentencing submissions prior to reaching the verdict in the case. Already in the \textit{Čelebići} case, which was decided on the merits after the 1998 amendment of Rules 85(A) and 100, the merged procedure was followed, giving retroactive effect to the amendment.\textsuperscript{166}

By contrast, SCSL Rule 85(A) from the outset contained no procedural step for the presentation of information related to sentencing at trial. The SCSL judges chose to revert to the original ICTR bifurcated procedure when modifying the ICTR RPE and adopting them as the SCSL Rules in March 2003. Rule 100(A) states that in case of both guilty pleas and conviction by the Chamber, the parties shall submit, within certain time limits, any relevant information that may assist it in determining an appropriate sentence.\textsuperscript{167} Alternatively to the

\textsuperscript{159} Transcript, \textit{Prosecutor v. Tadić}, Case No. IT-94-1-T, TC, ICTY, 7 May 1996, at 4-5 (‘no information that relates exclusively to the sentencing should be presented by the witnesses during the trial as to guilt or innocence. … If you have … a witness who testifies, a witness may testify as to guilt or innocence, but if the witness’s testimony is also solely directed towards matters that we should consider as a part of sentencing, we consider that we should hear that pursuant to the terms of Rule 100.’) and, in the same case, Scheduling Order, 27 May 1997 and Scheduling Order, 12 June 1997 (considering admissible for the purpose of sentencing ‘only reports, written statements and oral statements which provide relevant information that may assist the Trial Chamber in determining an appropriate sentence’, as opposed to ‘any material relating to the guilt or innocence’). See further W.A. Schabas, ‘Article 76’, in Triffterer (ed.), \textit{Commentary on the Rome Statute} 1415-16.


\textsuperscript{161} Explanatory Memorandum by the Tribunal’s President – STL Rules of Procedure and Evidence (as of 12 April 2012) (‘STL RPE Explanatory Memorandum’), para. 45 (‘At the international level, this model was initially upheld (see the first draft of the ICTY RPE (1994), Rules 99-100). Later on, at the behest of some Judges coming from the Romano-Germanic tradition, the two sets of proceedings were merged. This, it is submitted, proved to be a mistake’).

\textsuperscript{162} Rule 87(C) ICTY (IT/32/Rev. 19, 1 and 13 December 2000) and ICTR RPE (8 June 1998). From its adoption in July 1998 and until the December 2000 amendment, Rule 87(C) ICTY RPE specifically indicated that ‘If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at \textit{the same time} determine the penalty to be imposed in respect of each finding of guilt’ (emphasis added).

\textsuperscript{163} See Rule 100 (A) ICTR RPE (8 June 1998) and Rule 100 (A) ICTY RPE (IT/32/Rev. 13, 10 July 1998): ‘If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.’

\textsuperscript{164} Rule 86(C) ICTY and ICTR RPE. On closing arguments in detail, see Chapter 11.

\textsuperscript{165} Rule 86(B) ICTY and ICTR RPE.

\textsuperscript{166} Judgement, \textit{Prosecutor v. Delalić et al.}, Case No. IT-96-21-T, TC II quater, ICTY, 16 November 1998 (‘\textit{Delalić et al. trial judgement}’).

\textsuperscript{167} Rule 100(A) SCSL RPE (as adopted on 7 March 2003) provided that the prosecution shall submit ‘any relevant information’ on appropriate sentencing no more than 14 days after a conviction or guilty plea, and that the defendant shall submit such information thereafter, but not later than 21 days after the Prosecutor’s filing. On 24 November 2006, the Rule was amended to reduce these terms respectively to 7 days after conviction or guilty plea for the Prosecutor and 7 days after the Prosecutor’s filing for the Defence, apparently pursuant to the proposal by Prof. A. Cassese: see Suggestions for Consideration by the Plenary of Possible Amendments to
removal of the bifurcate trial structure, the SCSL judges chose the approach of allowing the
defence to make the sentencing submissions at separate hearings. The imposition of the
short time limits was deemed sufficient to ensure efficient and expeditious proceedings.168
The existence of the two approaches and the most appropriate choice for international
criminal tribunals that follow the ‘adversarial’ presentation scheme raises issues which will
be taken up in the evaluative part of this Chapter (section 4).

Be it as it may, regarding the scope and nature of the information mentioned in Rule
85(A)(vi) of the ICTY and ICTR RPE, the Chambers have held that the language of the Rule
is all-inclusive, ‘to the extent that it suggests the admission of evidence inadmissible at trial
for the purpose of determining the guilt or innocence of the accused’.169 While recognizing
the possibility for the prosecution to lead ‘all relevant evidence that may assist the Trial
Chamber in determining an appropriate sentence in the event that the accused is found
guilty’, the Delalić Trial Chamber appreciated the adverse effects such information may
have on the defendant. Therefore, it held that when submitting it, the prosecution will
‘observe the fundamental principle of the presumption of innocence to which the accused is
still entitled until convicted’.170 However, it remains unclear how exactly the prosecution is
to comply with that expectation.

The defence submissions at this stage are likely to include evidence on the mitigating
circumstances, including the good character of the accused and the absence of prior criminal
record.171 Insofar as such information is irrelevant for the purpose of determining the guilt or
innocence and may therefore be inadmissible, questioning witnesses who testify on facts on
the character and other circumstances pertinent to sentencing prior to the Rule 85(A)(vi) step
is not desirable because it might lead to repetitions.172 At the same time, it is ineffective to
require ‘fact witnesses’ capable of providing information relevant for sentencing to appear
twice. As a matter of judicial economy, counsel must not be precluded from eliciting both
types of information at the first appearance of the witness. In Kupreškić et al., defence
counsel for each accused were allowed to adduce at least one ‘exemplary witness’ on the
character at the Rule 85(A)(vi) step, while the other submissions of this nature were to be
made by way of written evidence.173

G. Reopening of the case

As noted previously, in limited circumstances the parties may be allowed to introduce
further or additional evidence after the close of their cases-in-chief.174 Next to rebuttal
evidence (Rule 85(A)(iii)) and evidence introduced through cross-examination of defence
witnesses, this includes the possibility of reopening the case. This is an extraordinary device

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168 See Cassese Suggestions on SCSL (n 167).
169 Delalić et al. trial judgement (n 166), para. 1213.
170 E.g. Decision on Limitation of Scope of Cross-Examination of Character Witnesses, Prosecutor v. Kupreškić et al., Case No. IT-95-16, TC, ICTY, 26 February 1999 (‘Kupreškić et al. character witnesses decision’).
172 Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, Prosecutor v. Kupreškić et al., Case No. IT-95-16, TC II, ICTY, 17 February 1999 (‘Kupreškić et al. character and tu quoque evidence decision’).
173 Ibid.
174 See n 87.
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not specifically provided for in the Rules but recognized in the case law. Unlike rebuttal, which is expressly foreseen in the RPE, reopening is implicit in the general power of the Chamber to amend case presentation and is fully subject to its discretion under Rule 85(A). Moreover, while rebuttal is by nature a prosecutorial device, either party may seek reopening. For example, the defence may be allowed to reopen its case where the prosecutor has knowingly and intentionally failed to disclose evidence material to the defence case that resulted in prejudice to the accused.

But even more importantly, rebuttal and reopening are distinguished by the different types of evidence which can be admitted and, consequently, by different legal tests to be applied by when determining whether to allow presentation of evidence. Whereas rebuttal evidence enables the prosecution to counter unanticipated matters arising from the defence case, the evidence sought to be introduced by way of reopening should be such that it has been unavailable to the relevant party earlier. According to the ICTY Appeals Chamber in Čelebić, which was followed in a plethora of ICTY, ICTR and SCSL cases, in order to qualify for admission as ‘fresh’, the evidence sought to be introduced by way of reopening must not have been in the possession of the prosecution at the time of the conclusion of its case-in-chief. It should be such that ‘by the exercise of all reasonable diligence could not have been obtained by the Prosecution at the time’. The earlier unavailable ‘fresh evidence’ should be distinguished from ‘fresh evidence’ used by the prosecution when cross-examining defence witnesses, which may be admitted despite earlier availability. The second requirement for the admission of ‘fresh’ evidence by way of reopening is its admissibility under Rule 89(C) and (D), i.e. relevance and probative value (not outweighed by the possible adverse effect on the fairness).

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175 Delalić et al. reopening decision (n 71), paras 26-7; Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, Prosecutor v. S. Milošević, Case No. IT-02-54-T, TC III, ICTY, 13 December 2005 (‘S. Milošević reopening decision’), para. 8; Mrkšić et al. reopening decision (n 106), para. 3; Decision on the Prosecution Joint Motion for Re-Opening its Case..., Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-T, TC III, ICTR, 16 November 2006 (‘Zigiranyirazo reopening decision’), para. 12; Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, TC II, SCSL, 28 September 2006 (‘Brima et al. reopening decision’), para. 17.

176 S. Milošević reopening decision (n 175), para. 8 n5 (suggesting, with reference to the Čelebić appeal judgment, that a case may in principle be reopened also by the defence).

177 Decision, Prosecutor v. Farundžija, Case No. IT-95-1711-T, TC II, ICTY, 16 July 1998, paras 16 (failure to disclose under Rule 68 is a ‘serious misconduct on the part of the Prosecution’); 19 (finding prejudice suffered by the Defence unable to fully cross-examine relevant witness and to call evidence) and 21 (ordering proprio motu to reopen proceedings in relation to selected issues, including the opportunity for the Defence to recall the Prosecution witness and to call its witnesses and for the Prosecutor to present rebuttal as the need may be). S. Milošević reopening decision (n 175), para. 9; Mrkšić et al. reopening decision (n 106), para. 3.

178 See Delalić et al. appeal judgement (n 86), paras 273 (distinguishing rebuttal evidence from ‘fresh’ evidence) and 283; Galić rebuttal decision (n 122), para. 5.

179 Delalić et al. appeal judgement (n 86), para. 286; Delalić et al. reopening decision (n 71), para. 26; Blagojević and Jokić rebuttal and reopening decision (n 86), para. 7; Galić rebuttal decision (n 122), para. 5; Brima et al. reopening decision (n 175), para. 20; Taylor additional witnesses decision (n 74), para. 8.

180 For a distinction, see S. Milošević reopening decision (n 175), note 6; Příč et al. documents in cross-examination appeal decision (n 74), para. 15 (‘Fresh evidence “refers to material that was not included in the Prosecution Rule 65 ter list and not admitted during the Prosecution’s case-in-chief but that is tendered by the Prosecution when cross-examining Defence witnesses. … [t]he term is not limited to the material that was not available to the Prosecution during its case-in-chief.”).

181 Delalić et al. appeal judgement (n 86), para. 283; Delalić et al. reopening decision (n 71), para. 27; Blagojević and Jokić rebuttal and reopening decision (n 86), para. 8; S. Milošević reopening decision (n 175), paras 9 and 11; Mrkšić et al. reopening decision (n 106), para. 4; Brima et al. reopening decision (n 175), paras 21-2.

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In deciding on requests for reopening, the two evaluative steps are consecutive and the ‘reasonable diligence’ determination is a ‘threshold inquiry’. This means that probative value and potential impact on fairness need not be considered where the threshold of ‘reasonable diligence’ has not been met. As part of the first step, the Chamber must satisfy itself that the evidence is ‘newly obtained’, i.e. obtained after the close of the party’s case-in-chief and, if so, that it could not be identified and presented, through the exercise of reasonable diligence, during the case-in-chief. As affirmed by the Appeals Chamber, the evaluation in accordance with the two parameters is ‘highly contextual, depending on the factual circumstances of the case’, and it is therefore to be carried out on a case-by-case basis. None of these requirements is a self-sufficient basis for a successful application for reopening. Should the party fail to satisfy any of these conditions, the evidence may not serve as a ground to reopen the case. The burden of establishing both circumstances falls to the moving party.

The Milošević Trial Chamber held that the ‘fresh evidence’ prong of the Čelebići test is mandatory and may not be surrogated by the notion that the Chamber holds a ‘residual discretion’ to reopen the case on the basis of the earlier available evidence in order to avoid a ‘miscarriage of justice’. Furthermore, the reasons failing to identify and present the already available evidence are irrelevant, whether these are ‘some inadvertence or administrative oversight’ or a specific order of the Chamber denying admission during the case-in-chief.

The finding that reopening for the purpose of presenting the previously available evidence may not be allowed in the exercise of the Trial Chamber’s discretion even where it would otherwise lead to a ‘miscarriage of justice’ was a subject of controversy. Judge O-Gon Kwon, who was in the minority in Milošević, opined that evidence on the guilt or innocence of the accused that is not newly obtained but may have an impact on the verdict can in exceptional circumstances serve as a basis for reopening. In particular, evidence the

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183 S. Milošević reopening decision (n 175), para. 22; Brima et al. reopening decision (n 175), paras 21; Taylor additional witnesses decision (n 74), para. 12.
184 Delalić et al. appeal judgement (n 86), para. 288; S. Milošević reopening decision (n 175), paras 22 and 24; Decision on Prosecution’s Application to Re-Open its Case, Prosecutor v. Hadžihasanović and Kubura, Case No. IT-01-47-T, TC II, ICTY, 1 June 2005 (‘Hadžihasanović and Kubura reopening decision’), para. 42; Brima et al. reopening decision (n 175), paras 21-2; Taylor additional witnesses decision (n 74), para. 12.
185 Delalić et al. appeal judgement (n 86), para. 276 (the requirement that evidence must be ‘newly obtained’ ‘merely puts it into the category of fresh evidence, to which different basis of admissibility applies.’) and 283 (categorization of evidence as ‘newly obtained’ does not render it admissible by way of reopening, unless ‘with reasonable diligence, the evidence could not have been identified and presented in the case in chief of the party making the application); Delalić et al. reopening decision (n 71), para. 26 (‘fresh’ evidence is ‘not merely … evidence that was not in fact in possession of the Prosecution at the time of the conclusion of its case, but … evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time’); S. Milošević reopening decision (n 175), para. 14 (i) and (ii).
186 Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals against Trial Chamber’s Decision to Reopen the Prosecution Case, Prosecutor v. Gotovina et al., Case No. IT-06-90-AR73.6, AC, ICTY, 1 July 2010, para. 24; Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Reopen its Case-in-Chief, Prosecutor v. Popović et al., Case No. IT-05-88-AR73.5, AC, ICTY, 24 September 2008, para. 10.
187 S. Milošević reopening decision (n 175), para. 21 (‘satisfaction of the reasonable diligence standard is a necessary—but not on its own sufficient—step for a successful re-opening application’).
188 Delalić et al. appeal judgement (n 86), para. 286; Delalić et al. reopening decision (n 71), para. 26; S. Milošević reopening decision (n 175), paras 11, 24 and 28; Hadžihasanović and Kubura reopening decision, supra note 184, para. 36; Brima et al. reopening decision (n 175), para. 23; Taylor additional witnesses decision (n 74), para. 14.
189 S. Milošević reopening decision (n 175), paras 20-23.
190 S. Milošević reopening decision (n 175), para. 23 (reasoning in general that ‘[a]pplication of the reasonable diligence standard—indeed, the entire exercise of re-opening a party’s case—is reserved for “fresh” evidence, which by definition excludes any evidence already in the possession of the moving party during its case-in-chief.’).
exclusion of which would lead to a miscarriage of justice is in any event admissible on appeal under Rule 115 as additional evidence. In the first ICTR case involving reopening, the Trial Chamber applied a less stringent standard of ‘fresh’ evidence when it allowed the prosecution to reopen its case based on evidence that had been available earlier but excluded to avoid ‘damage to the integrity of the proceedings’. The ICTR Chamber invoked its discretion to reopen the case ‘in the interests of justice’ and in order to ensure fairness to both parties.

The jurisprudence sets out some elements in the determination of whether the ‘reasonable diligence’ prong of the test has been satisfied in a particular case. For example, an unreasonable delay in securing evidence that the party intends to use for its case-in-chief, particularly if difficulties could have been anticipated, has been deemed inconsistent with the exercise of reasonable diligence. The same a fortiori applies to a situation in which no attempt to locate or obtain the evidence was made until the close of the party’s case, with no explanation given for the delay. Similarly, failure by a party to take advantage of all means to obtain the evidence (including the request to the Chamber to exercise its Rule 54bis powers) is inconsistent with ‘reasonable diligence’. Moreover, the party may be required to be proactive by informing the Chamber as promptly as possible that it may be unable to conclude its investigation before the close of its case. This would enable the Chamber to rule on the admission of evidence emerging from the continued investigation.

By contrast, where the moving party remained ignorant of the existence of the proposed evidence until after the close of its case, the delay in obtaining the evidence does not indicate the lack of reasonable diligence, as long as such ignorance is reasonable in the circumstances. For example, the ‘reasonable diligence’ threshold was deemed to have been satisfied by the request the SCSL prosecutor’s request to reopen its case-in-chief in order to call witnesses Naomi Campbell, Mia Farrow, and Carol White in the Taylor case. Trial Chamber II deemed the defence argument that, as part of ‘reasonable diligence’, the prosecutor should have investigated the circumstances of Charles Taylor’s travels in order to ascertain whether he was carrying diamonds, what their origin was, who was present with

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191 Separate opinion of Judge O-Gon Kwon, S. Milošević reopening decision (n 175) (opining that ‘the miscarriage of justice standard articulated by the Appeals Chamber in reviewing additional evidence at the appellate level can be applied mutatis mutandis at the trial level’ in exceptional circumstances and subject to the Chamber’s discretion).
192 Zigiranyirazo reopening decision (n 175), paras 18–9 (allowing reopening of the case in a situation in which the evidence was available earlier but excluded to avoid ‘damage to the integrity of the proceedings’, relying on the discretion to reopen ‘in the interests of justice’).
193 Hadžihasanović and Kubura reopening decision (n 184), paras 38–42 (in relation to the OTP, indicating four aspects of ‘due diligence’: having identified questions of fact and law underlying the case; ‘methodic and systematic’ inquiry into all potential sources of evidence; deciding upon the necessity of obtaining the evidence by the close of case-in-chief; and making every effort to obtain all evidence deemed necessary prior to the case-in-chief).
194 S. Milošević reopening decision (n 175), para. 25 (‘While the Chamber is cognisant of the difficulties that parties before the Tribunal face in investigating and preparing the cases of such scope and complexity, it considers that a party seeking evidence intended for use in its case in chief should not wait until several months after the commencement of its case to begin the process of obtaining it.’).
195 Ibid., paras 26-7 (noting, however, that the party’s reasonable ignorance of the existence of an item until well into its case or after the close of the case may be consistent with ‘reasonable diligence’); Brima et al. reopening decision (n 175), para. 36 (pointing out the Prosecutor’s inactivity in contacting the proposed witness who has been located, ‘despite having long-standing previous knowledge of his potential importance’).
196 Ibid., para. 30.
197 Hadžihasanović and Kubura reopening decision (n 184), para. 42; Brima et al. reopening decision (n 175), para. 37. See S. Milošević reopening decision (n 175), para. 11 n10 (indicating that the Hadžihasanović ‘reasonable diligence’ test is not the general but case-specific standard, although its elements may be useful to consider).
198 S. Milošević reopening decision (n 175), para. 27.
him on the trips, and whether trips resulted in an arms shipment, to place an unreasonable investigative burden on the prosecution.\footnote{Taylor additional witnesses decision (n 74), para. 16.} The Chamber also considered it relevant that the prosecutor had undertaken many unsuccessful attempts to contact the witness Campbell once the relevant information came into its possession after the close of its case-in-chief.\footnote{Ibid.}

Where both elements of the reopening test have been satisfied, the Chamber will assess whether the ‘fresh’ evidence sought to be introduced by way of reopening would be admissible at that stage. In doing so, it shall balance the probative value of the ‘fresh’ evidence against the possible adverse effects of its admission for the rights of the accused.\footnote{Hadžihasanović and Kubura reopening decision (n 184), para. 47; S. Milošević reopening decision (n 175), paras 14 (iii) and 33.} Given the exceptional nature of the reopening procedure, the Chamber holds ultimate discretion in this matter.\footnote{Delalić et al. appeal judgement (n 86), paras 286 and 288; Delalić et al. reopening decision (n 71), para. 27; S. Milošević reopening decision (n 175), paras 12 and 37 (indicating that even though the showing of ‘exceptional circumstances’ is not a separate burden imposed on the moving party, the term ‘exceptional’ properly describes the context in which the application to re-open would be successful); Brima et al. reopening decision (n 175), para. 22; Taylor additional witnesses decision (n 74), para. 13.} The jurisprudence has identified the following criteria for measuring the impact of the admission of ‘fresh’ evidence on a fair trial: (i) the stage of the trial at which the evidence is sought to be adduced (the later in the trial the application is made, the less likely it is that the Trial Chamber will allow it); (ii) the delay in the trial likely to be caused by the admission of the evidence; and (iii) the effect of bringing new evidence against one accused in a multi-defendant case.\footnote{Delalić et al. appeal judgement (n 86), paras 286 and 288; Delalić et al. reopening decision (n 71), para. 27; S. Milošević reopening decision (n 175), paras 13 and 36 (‘the advanced stage of trial proceedings; the certainty that a delay, of whatever length, would be caused by the admission of the proposed evidence; and the probable extent of such a delay’); Blagojević and Jokić rebuttal and reopening decision (n 86), paras 10-1; Hadžihasanović and Kubura reopening decision (n 184), para. 45; Decision on Prosecution’s Motion to Reopen Its Case, Prosecutor v. Gotovina et al., Case No. IT-06-90-T, TC I, ICTY, 21 April 2010, para. 10; Zigiranyirazo reopening decision (n 175), paras 16-7; Brima et al. reopening decision (n 175), para. 29 (noting that the stage of trial at which the admission of evidence is sought through reopening of the case is a matter for consideration under the second criterion as relevant to fairness to the accused, rather than as a matter relevant to the criterion of ‘reasonable diligence’); Kanyabashi witness recall decision (n 132), para. 23.} Depending on these factors and their interplay in a specific case, the probative value of the evidence suggested as the basis for reopening must be particularly high in order to outweigh any countervailing considerations. For instance, such evidence may be required to have a significant bearing on the individual criminal responsibility of the accused.\footnote{S. Milošević reopening decision (n 175), paras 37-8 (holding that the relevant evidence fails to satisfy this parameter and thus is not an appropriate basis for re-opening).}

3.2.2 Order and modes of examination of witnesses

A. General remarks

ICTY, ICTR, and SCSL Rule 85(B) establishes a ‘fine’ order of the presentation of evidence: it determines the sequence in which each witness is questioned by the parties and the judges. Where the accused is represented, it is usually counsel who conduct questioning, but the accused exceptionally may be authorized by the Chamber to put questions directly to the witness.\footnote{See e.g. Prlić et al. guidelines (n 90), para. 9.I.c.; Decision on the Mode of Interrogating Witnesses, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC II, ICTY, 10 May 2007 (‘Prlić et al. decision on mode of interrogating witnesses’), para. 11; Prlić et al. defence guidelines (n 96), para. 3 (clarifying also that ‘[e]xceptional circumstances relate in particular to the examination of events in which an Accused participated personally, or the examination of issues about which he possesses specific expertise.’).} In defining the order of questioning, Rule 85(B) employs overt common law
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terminology. It provides for the unconditional right of a calling party to conduct examination-in-chief and re-examination, and the right of the opponent to cross-examine a witness in between.\textsuperscript{206} The judges may pose questions to a witness at any stage of examination.\textsuperscript{207} As noted, the sequence of questioning in Rule 85(B) is not variable by the judges – the dialectical ‘adversarial’ approach to probing witness evidence has no alternative in the Rules.\textsuperscript{208} Accordingly, the same order and modes of questioning generally apply to all stages of evidence presentation pursuant to Rule 85(A).\textsuperscript{209}

The only exception is the phase during which the Chamber may call its evidence \textit{proprio motu}.\textsuperscript{210} In the context of the Rule 98 procedure, judges play the role of a ‘calling party’, and the procedure applied is as follows. The Chambers will invite a witness summoned \textit{proprio motu} to open testimony with a ‘spontaneous statement’, which is followed by judicial questioning and questions by the parties.\textsuperscript{211} The witness may be cross-examined by the prosecutor and then by the defence counsel on the matters covered in her earlier statement (if any) and/or her testimony in response to the Chamber’s questions, matters raised by answers elicited by the questions of the other cross-examining party, and on questions of credibility.\textsuperscript{212} By analogy with the sequence of examining parties’ witnesses, the Chamber may re-examine its witness and, where new issues arise from re-examination, both parties will be allowed to follow them up in the ‘further cross-examination’.\textsuperscript{213} Having the defence examine the witness last secures them the advantage of hearing answers to the questions posed by other actors and enables the defence to conduct cross-examination more effectively.\textsuperscript{214} In principle, the regular order of examination envisaged in Rule 85(B) may be followed whenever one of the parties requests the summons, in which case that party will conduct examination-in-chief, after which the witness may be cross-examined by the other party, and re-examined by the requesting counsel.\textsuperscript{215}

Finally, Rule 90(F) of the ICTY, ICTR and SCSL RPE entrusts the judges with the function of controlling the mode and order of questioning witnesses and presenting evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time.\textsuperscript{216} This means that the Chamber, acting on the objection of another party or \textit{proprio motu}, may interrupt or turn down certain questions in order to prevent repetitive or abusive questioning.

\begin{itemize}
\item[206] Delalić \textit{et al.} decision on presentation of evidence (n 66), para. 28.
\item[207] Ibid., para. 26.
\item[208] May and Wierda, \textit{International Criminal Evidence} (n 65), at 145.
\item[209] E.g. Kupreškić \textit{et al.} character witnesses decision (n 171) (finding no reason to depart from the regular scope of cross-examination under Rule 90(H) for character witnesses).
\item[210] See supra 3.2.1.E.
\item[211] Blaškić witness Hadžihasanović decision (n 152), at 3 (defining the ‘spontaneous statement’ as the opportunity ‘to testify freely about the [relevant] matters of which [the witness] had knowledge’ and also permitting the witness to rely on personal notes during testimony without reading out a prepared statement); Order Summoning Dr. Biljana Plavšić, \textit{Proprio Motu}, to Appear as a Witness of the Trial Chamber Pursuant to Rule 98, \textit{Prosecutor v. Slakić}, Case No. IT-97-24-T, TC II, ICTY, 9 January 2003. See also sources cited in n 152.
\item[212] Kupreškić \textit{et al.} witness summons (n 145), at 3; Orić \textit{proprio motu} order (n 149), at 4; Annex, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-T, TC I, ICTY, 24 April 2006 (‘Krajišnik chamber witnesses decision’), para. 16 (c) and (d). In the \textit{Krajišnik} case, the TC provided parties with witness statements in advance of testimony in order to give them prior notice of its contents.
\item[213] Ibid., para. 16(e) and (f). On re-examination, see infra 3.2.2.D.
\item[215] Decision on Defence Motion to Summon Witnesses, \textit{Prosecutor v. Kupreškić et al.}, Case No. IT-95-16-T, TC II, ICTY, 6 October 1998 (‘Kupreškić \textit{et al.} decision to summon witnesses’).
\item[216] Rule 90(F) ICTR RPE was introduced on 8 June 1998; Rule 90(F) ICTY RPE on 9-10 July 1998, originally as Rule 90(G) (IT/32/Rev. 13, 10 July 1998).
\end{itemize}
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B. Examination-in-chief

The testimony of a witness starts with examination by the party that has called the witness.\(^{217}\) At direct examination, the party poses questions with a view to eliciting in open court the evidence favourable to the party’s case and supporting its version of the facts.\(^{218}\) While the parties are generally free to decide which witnesses to put to the stand, the Chamber exercises a degree of control over this process by way of allocating time for examination-in-chief.\(^{219}\) It also holds a competence to supervise the length of the examination.\(^{220}\)

The calling party is at liberty to determine the subject-matter of examination-in-chief of specific witnesses and to direct its course by formulating questions and by asking a witness to clarify some issues and to focus on relevant matters in the case. Of course, evidence must be relate to the points in the indictment and to the issues notified in advance as part of factual summaries submitted to the PTJ or the Trial Chamber during the preparation for trial.\(^{221}\) The party may also expand the examination-in-chief to points not contained in the summaries which may have arisen during the proofing of a witness, but the other party and the Chamber must be notified as soon as possible so that the former may prepare for cross-examination and the latter to rule on any objections.\(^{222}\)

Whenever witnesses whose previous testimony or statement has been admitted into evidence pursuant to Rule 92\(^{\text{bis}}\) are called for cross-examination, the calling party may not introduce new evidence through examination-in-chief.\(^{223}\) Witnesses called under Rule 92\(^{\text{ter}}\) may be examined-in-chief by the calling party with leave of the Chamber, but the direct examination must be focused on clarifying or highlighting particular aspects of the Rule 92\(^{\text{ter}}\) statements.\(^{224}\)

The prohibition on the leading questions, i.e. questions formulated in the way suggesting a desired answer or assuming facts on matters in dispute is an exception to the broad autonomy of parties in conducting examination-in-chief.\(^{225}\) This rule is rooted in the idea that it is the witness rather than the party examining that must be the source of the evidence; it may be impossible for the finder of fact to accurately weigh the answer that was not given spontaneously but prompted.\(^{226}\) However, it is not an absolute rule because the Chamber may still grant leave to ask leading questions in certain situations, e.g. when the party’s witness turns hostile.\(^{227}\) Long, complicated, or compound questions are discouraged,

\(^{217}\) Rule 85(B) ICTY, ICTR and SCSL RPE (‘It shall be for the party calling a witness to examine such witness in chief’).

\(^{218}\) Delalić et al. decision on presentation of evidence (n 66), para. 22 (‘the process whereby a party who has called a witness to give evidence in support of his case elicits from such witness through questions evidence relevant to the issues favourable to his case’).

\(^{219}\) See n 63. Decision on Prosecution’s Motion to Vary its Rule 65 ter Witness List, Prosecutor v. Halilović, Case No. IT-01-48-T, TC I Section A, 7 February 2005, at 6 (noting that ‘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’).

\(^{220}\) Stanišić and Župljanin guidelines (n 97), para. 19.

\(^{221}\) Prlić et al. defence guidelines (n 96), para. 6. See Rule 65ter(E)(ii)(b) and (G)(i)(b), (c) ICTY RPE; Rule 73bis(B)(iv)(b), (c) and 73ter(B)(iii)(b), (c) ICTR and SCSL RPE.

\(^{222}\) Prlić et al. defence guidelines (n 96), para. 6.


\(^{224}\) Martić guidelines (n 223), para. 18.

\(^{225}\) On ‘leading’ and ‘compound’ questions in common law trial practice, see M. Fontham, Trial Technique and Evidence, 2nd edn (LexisNexis, 2002) 307.

\(^{226}\) Rohan, ‘Rules Governing the Presentation of Testimonial Evidence’ (n 31), at 507.

\(^{227}\) Ibid.; Cassese, International Criminal Law (n 214), at 410. See Decision on Prosecutor’s Motion on Trial Procedure, Prosecutor v. Kordić and Ćerkez, Case No. IT-95-14/2-PT, TC III, ICTY, 19 March 1999; Prlić et al. defence guidelines (n 96), para. 5.
insofar as they tend to confuse witnesses and obscure the trial record. For the same reason, the parties should not paraphrase previous testimony or statements of witnesses in their questions: this bears the risk of mischaracterizing any prior statements. Instead, they may quote the relevant passages and give an indication of the exact page numbers and relevant lines in the transcript. Any such quoting is to be restricted to situations when it is strictly necessary for the question to be understood.

C. Cross-examination

Rule 85(B) of the ICTY, ICTR and SCSL Rules envisages cross-examination as the stage of testimonial process that follows examination-in-chief. The adversary party takes over questioning of a witness from the calling party. In multiple-accused trials, counsel for the co-accused who has not called the witness may cross-examine her on behalf of that co-accused. The key objectives of cross-examination are to elicit information favourable to the cross-examining party by casting doubt on the accuracy of prejudicial information arisen from evidence-in-chief as well as by challenging credibility.

As noted above, a calling party should not seek to discredit and impeach its own witness. However, it may be allowed by the Chamber to cross-examine a hostile witness, i.e. a witness whom the calling party deems by the party to be testifying falsely, incompletely or inconsistently with her previous statements or refuses to answer the question during examination-in-chief. The characterization of a witness as ‘hostile’ or ‘adverse’ to the calling party must be preceded by an evaluation by the Chamber of the difference between her oral evidence and previous statements, as well as her demeanor during the oral evidence and the circumstances in which previous statements were made.

Leading or suggestive questions are generally allowed at cross-examination. The use of such questions is justified because they are apt to impact on the credibility of the witness. However, leading questions may be disallowed in situations in which cross-examination, as a matter of fact, amounts to examination-in-chief. For instance, this concerns the cross-examination on issues not raised during examination-in-chief or the

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228 Delić guidelines (n 97), para. 2; Martić guidelines (n 223), para. 1; Stanišić and Župljanin guidelines (n 97), para. 17; Prlić et al. guidelines (n 90), para. 9.1.d.; Prlić et al. defence guidelines (n 96), para. 4.

229 Martić guidelines (n 223), paras 3-4; Delić guidelines (n 97), paras 4-5; Prlić et al. guidelines (n 90), para. 9.1.d; Prlić et al. defence guidelines (n 96), para. 4; Stanišić and Župljanin guidelines (n 97), para. 17.

230 On the specifics of examination in multi-accused cases, see infra 3.2.2.G.

231 Delić et al. decision on presentation of evidence (n 66), para. 22 (‘the examination of a witness by questions by the adversary against whom the witness has testified’). See S. Mitchell (ed.), Archbold: Pleading, Evidence & Practice in Criminal Cases, 40th edn (London: Sweet & Maxwell, 1979) 353 (‘Questions put in cross-examination must be either relevant and pertinent to the matter in issue, or calculated to attack the witness’s title to credit.’). For an overview of common law literature on cross-examination, see Decision on Prosecution Motion Concerning Use of Leading Questions…, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 4 July 2008 (‘Prlić et al. leading questions decision’), para. 14.

232 Decision on Admission into Evidence of Prior Statement of a Witness, Prosecutor v. Halilović, Case No. IT-01-48-T, TC I Section A, 5 July 2005, at 4-5; Limaj et al. prior statements decision (n 71), para. 31 (‘witnesses “hostile or adverse to the Prosecution [are] witnesses appeared not to be prepared to tell the truth in oral evidence before the Chamber, when examined by the Prosecution”; Transcript, Prosecutor v. Limaj et al., Case No. IT-03-66, TC II, ICTY, 18 January 2005, at 2143-5; 1 February 2005, at 2736-8; Transcript, Prosecutor v. Brdanin and Talić, Case IT-99-36, TC II, ICTY, 23 January 2002, at 677-8; 24 January 2002, at 805-8; Decision on Appeals Against Decision on Impeachment of a Party’s Own Witness, Prosecutor v. Popović et al., Case No. IT-05-88-AR73.3, AC, ICTY, 1 February 2008 (‘Popović et al. witness impeachment decision’).

233 Limaj et al. prior statements decision, supra note 71, para. 31.

234 Decision on Prosecutor’s Motion on Trial Procedure, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-PT, TC, ICTY, 19 March 1999 (‘it is the practice of the International Tribunal not to allow leading questions on matters in dispute’).

235 Prlić et al. leading questions decision (n 231), para. 18.
cross-examination of a witness hostile to one party by the ‘adverse’ party.\textsuperscript{236} Given the potentially broad subject-matter of cross-examination, the Rules do not dictate the adoption of particular forms of questioning, and the Chambers exercise discretion in this regard, just as they in relation to other of trial management and admissibility issues.\textsuperscript{237}

The right of the accused to cross-examine witnesses in accordance with Rule 85(B) reflects the fundamental fair trial guarantee, namely the right of the accused ‘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’, the right provided for in the tribunals’ statutes and human rights treaties.\textsuperscript{238} The jurisprudence recognizes the right to cross-examine along with the procedural rules on the proper scope of cross-examination as the basic fair trial guarantees of the accused.\textsuperscript{239} Even though parties rarely if ever bypass the opportunity to cross-examine, the question of whether or not to do cross-examination remains within their discretion. The Trial Chamber may therefore not infer that statements unchallenged at cross-examination are truthful.\textsuperscript{240} Although there is no formal obligation to cross-examine, certain negative consequences may accrue to a failure to conduct cross-examination of a witness on the matters relevant to the party’s case, in particular where the party seeks to present contradictory evidence that the witness has not had the opportunity to comment on previously.\textsuperscript{241} Arguably, this amounts to a \textit{de facto} duty to cross-examine, limited as it is, in situations where the party intends to led contradictory evidence in its case-in-chief or rejoinder or in its rebuttal (the prosecution).

In keeping with the human rights standards, the right to cross-examine is not absolute and subject to the Trial Chamber’s authority to ensure a fair and expeditious trial.\textsuperscript{242} After careful consideration, the Chamber may curtail this right and disallow cross-examination of a witness in specific and narrow circumstances provided for in the Rules. For example, it may decide under Rule 92bis that the written evidence may be admitted \textit{in lieu}

\footnotesize{236} \textit{Prlić et al.} decision on mode of interrogating witnesses, \textit{supra} note 205, para. 13; \textit{Prlić et al.} defence guidelines (n 96), para. 8 (‘the cross-examination dealing with a subject not raised in the direct examination is not a cross-examination strictly speaking, but an examination resembling the direct examination. As a result, the rules applying to direct examination must be respected. Consequently, leading questions shall not be permitted in this type of examination.’) See also A. Tieger, ‘Cross-Examination’, in A. Cassese (ed.), \textit{The Oxford Companion to International Criminal Justice} (Oxford: Oxford University Press, 2009) 288.

\footnotesize{237} \textit{Popović et al.} witness impeachment decision (n 232), para. 12; \textit{Prlić et al.} leading questions decision (n 231), para. 15.

\footnotesize{238} Art. 21(4)(e) ICTY Statute; Art. 20(4)(e) ICTR Statute; Art. 17(4)(e) SCSL Statute.


\footnotesize{241} See text accompanying \textit{infra} n 279.

\footnotesize{242} Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, together with Associated Exhibits, from Evidence, \textit{Prosecutor v. Martić}, Case No. IT-95-11-T, TC I, ICTY, 9 June 2006 (‘\textit{Martić} trial decision on exclusion’), para. 56; Decision on Motion for an advance Ruling on the Scope of Permissible Cross-Examination, \textit{Prosecutor v. Vinko Babić}, Case No. IT-95-11-AR73.2, AC, ICTY, 14 September 2006 (‘\textit{Vinko Babić} appeal decision on cross-examination’), paras 12 and 14; Decision on Prosecution’s Rule 92bis Motion, \textit{Prosecutor v. Milutinović et al.}, Case No. IT-05-87-PT, TC III, ICTY, 4 July 2006, para. 11; Decision on Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Dated 24 May 1998, \textit{Prosecutor v. Delalić et al.}, Case No. IT-96-21-T, TC II quater, ICTY, 12 June 1998, para. 32 (‘the right of the accused, though guaranteed is subject to the power of the Trial Chamber in Art. 20(1) to ensure a fair and expeditious trial’); \textit{Prlić et al.} appeal decision on cross-examination (n 239), at 3.
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of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. It may also do so when the witness has been cross-examined in the previous proceedings. The evidence going to proof of the acts and conduct of the accused or pivotal to the prosecution case that has not been subjected to cross-examination must be corroborated at all times if used to convict.

The objective of guaranteeing a fair and expeditious trial is the rationale for the Chamber’s practice of allocating time to the parties for their cross-examination. Usually, the Chambers have allowed parties the same amount of time in total for cross-examining viva voce witnesses as that allotted for examination-in-chief, although more time could in principle be granted upon the showing of a good cause. In some single-accused cases, however, the Trial Chamber requested the parties to limit the length of cross-examination to 60% of the time allowed for examination-in-chief, although reportedly this rule was interpreted flexibly in the course of the proceedings. Such limitations may be imposed where the examination-in-chief has been particularly brief, where the witness is an expert witness, or where fairness to the accused so requires.

The important aspect of this process is judicial control over the mode of cross-examination in accordance with Rule 90(F). The highest point in and a distinct earmark of the adversarial proof-taking, cross-examination is a direct interaction between the witness and adversary counsel. Often, it involves an attempt by counsel to discredit the witness and discard as inaccurate or unreliable her evidence-in-chief. Hence, cross-examination may be confrontational and, in extreme cases, slide into an ad personam attack on a witness. This is especially problematic in international criminal proceedings where many witnesses are also victims of the crimes and particularly vulnerable.

Therefore, the key regulatory issue is the proper scope of cross-examination and the criteria to be relied upon by the judges in distinguishing between admissible and abusive modes of questioning. The ICTY and ICTR RPÉ expressly limit the matters that may be addressed to three categories: (i) ‘the subject-matter of the evidence-in-chief’; (ii) ‘matters affecting the credibility of the witness’ and (iii) ‘where the witness is able to give evidence without having to go to proof of a matter other than the acts and conduct of the accused as charged in the indictment’.

244 Decision on Prosecutor’s Appeal on Admissibility of Evidence, Prosecutor v. Aleksovski, Case No. IT-95-141-AR73, AC, ICTY, 16 February 1999, para. 27 (no opportunity to cross-examine in case of the admission of hearsay is counterbalanced by previous cross-examination of the witness in other proceedings). Where the completion of cross-examination is impossible due to the death of the witness, the defence ought to be allowed to further challenge that testimony by other evidence: Martyć trial decision on exclusion (n 242), para. 79 et seq.
245 Martyć appeal decision on exclusion (n 242), para. 20; Martyć trial decision on exclusion (n 242), para. 67.
246 Martyć guidelines (n 223), para. 11; Delić guidelines (n 97), para. 15; Stanišić and Župljanin guidelines (n 97), para. 19; Prlić et al. guidelines (n 90), at 5; Prlić et al. defence guidelines (n 96), para. 14.
247 Cf. Third Order on the Use of Time in the Defence Case and Decision on Prosecution’s Further Submissions on the Recording and Use of Time during the Defence Case, Prosecutor v. S. Milošević, Case No. IT-02-54-T, TC II, ICTY, 19 May 2005, at 1 (the Prosecution is allotted 60% of the time of the defence case-in-chief) and, in the same case, Fourth Order Recording Use of Time in the Defence Case, 1 July 2005 (reporting that ‘the time taken by the Prosecution amounts to just over 65% of the time taken by the Defence in the presentation of its case-in-chief’); See also Delić guidelines (n 97), para. 15 n17. See Transcript, Prosecutor v. Krajišnik, Case No. IT-00-39-T, TC I, ICTY, 23 April 2004, at 2652 and 27 May 2004, at 3068-9; Prlić et al. defence guidelines (n 96), para. 15.
248 Delić guidelines (n 97), para. 15; Martyć guidelines (n 223), para. 11.
249 J.H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Vol. 1, 3rd ed. (Boston: Little Brown, 1940) §1367 (‘in more than one sense [cross-examination] takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. … [C]ross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.’).
relevant to the case for the cross-examining party, to the subject-matter of the case’.  

Concerning the third category, in conformity with classical common law Browne v. Dunn rule, both ICTY and ICTR RPE require that the cross-examining counsel shall put to the witness the nature of his or her case which is contradicted by that witness’s evidence. Furthermore, judges may allow inquiries into additional matters beyond the areas already mentioned. But unlike for other matters properly within the scope of cross-examining (ICTY Rule 90(H)(i) and ICTR Rule 90(G)(i)), parties are under a duty to seek leave of the Chamber when they wish to pose questions on such other matters. 

In contrast with the ad hoc tribunals, the SCSL does not have a specific provision determining the admissible scope of cross-examining equivalent to ICTY Rule 90(H). The SCSL RPE leave it to the judges to define it on a case-by-case basis by exercising their general power to regulate the mode and order of questioning pursuant to SCSL Rule 90(F). The SCSL recognized that, in its ‘open system of cross-examination’, a cross-examining party is not limited to addressing questions arising from direct examination but may cross-examine ‘on matters of joint criminal enterprise and credibility’.  

As confirmed by the ICTY Appeals Chamber, the trial judges hold a wide discretion in establishing the standards governing cross-examination and in ensuring compliance therewith. The parameters assisting the judges with the exercise of such discretion have been developed on a case-by-case basis and in a piece-meal fashion. In numerous cases, judges have adopted general guidelines on the process for the presentation of evidence, which were complemented by rulings dealing with specific issues as they arose. For instance, the Chambers have held that when dealing in cross-examination with questions falling within the subject-matter of examination-in-chief relating to the historical, political, and military context of the case—questions on which are generally allowed—the parties should state the purpose and relevance of those questions to the allegations against the accused. The questions regarding the alleged conduct by the other party in the conflict

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250 Rule 90(H)(i) ICTY RPE; Rule 90(G)(i) ICTR RPE. Rule 90(H) ICTY RPE was adopted at the 18th plenary session (9-10 July 1998); see Fifth Annual Report of the ICTY (n 67), para. 108. Its original language limited the subject-matter of cross-examining to ‘direct examination and matters affecting the credibility of the witness’. The subsequent amendment of 17 November 1999 among others replaced ‘direct examination’ with ‘examination-in-chief’ and extended the scope of cross-examination to the subject-matter of the case for the cross-examining party. Rule 90 (G) of the ICTR RPE was adopted on 8 June 1998, providing that ‘cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit enquiry into additional matters, as if on direct examination’. On 27 May 2003, the rule was amended to its present form, bringing it in line with the amended ICTY Rule 90(H), ‘in order to facilitate the proceedings’. See Eighth Annual Report of the ICTR, A/58/140-S/2003/707 11 July 2001, para. 6.  
251 Browne v. Dunn (1893) 6 R. 67, House of Lords.  
252 Rule 90(H)(i) ICTY RPE (as amended on 17 November 1999); Rule 90(G)(ii) ICTR RPE (as amended on 27 May 2003).  
253 Rule 90(H)(ii) ICTY RPE; Rule 90(G)(iii) ICTR RPE.  
254 Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 29 November 2008 (‘Prlić et al. cross-examination decision’), para. 13.  
255 Norman et al. decision on cross-examination (n 238), paras 17-8; Decision on the Third and Second Accused’s Request for Leave to Raise Evidentiary Objections, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, TC I, SCSL, 8 June 2006 (‘Norman et al. decision on evidentiary objections’), at 2.  
256 Prlić et al. appeal decision on cross-examination (n 238), at 2, with reference to Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, S. Milošević v. Prosecutor, Case No. IT-02-54-AR73.7, AC, ICTY, 1 November 2004 (noting the TC’s ‘organic familiarity with the day-to-day conduct of the parties and practical demands of the case’, and its ability to carry out ‘a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings’); Martić appeal decision on evidence (n 242), para. 6.  
257 See e.g. decisions cited in n 246.  
258 Martić guidelines (n 223), para. 8; Delić guidelines (n 97), para. 9; Decision on Defence Motion for Clarification on the Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination Pursuant
may be allowed to a limited degree and after the counsel has clarified their purpose and relevance, although *tu quoque* is not recognized as a valid defence.\textsuperscript{259} To the extent that such questions might fall beyond the temporal or material scope of the indictment, they may be disallowed as irrelevant.\textsuperscript{260}

The specifics of crossing-examining Rule 92bis witnesses on the ‘subject-matter of the examination-in-chief’ are that any questions: (i) must be limited to those matters for which the Trial Chamber has decided to allow the witness to be called for cross-examination; and (ii) shall not include questions relating to the summary of the 92bis statement or transcript, which shall normally be read out at the start of testimony, unless related to the former matters.\textsuperscript{261} Otherwise, the regular rules governing cross-examination apply.

ICTY and ICTR Rule 90(H)(i) includes issues of credibility of the witness within the scope of cross-examination, even though such questions are probing and may be experienced by a witness as an ordeal.\textsuperscript{262} The Rule does not specify which matters that can be raised to challenge credibility. The parties’ autonomy in this regard is subject to the Chamber’s duty to ensure that any interrogation is effective for the purpose of ascertaining the truth and does not amount to needless consumption of time.\textsuperscript{263} However, generally, the right of the accused to pose questions going to the credibility of a witness is regarded as a fundamental fair trial guarantee not to be impinged on unnecessarily. In *Milutinović et al.*, the ICTY Appeals Chamber regarded Rule 90(H)(i) to be ‘important for effective realization of an accused’s right to confront the witnesses brought against him’, and held restrictions upon the defence, such as the proposed limitation of the scope of cross-examination and the need to obtain prior approval for expanding it, to be ‘patently unfair.’\textsuperscript{264} This concerned in particular the request by the prosecutor to order the defence to disclose in advance the lines of cross-examination of the Rule 70 witness and to seek prior leave to expand the scope of cross-examination besides subject-matter of examination-in-chief.\textsuperscript{265}

In any event, cross-examination directed at the credibility of the witness is not a ‘boundless exercise’ and should be conducted ‘within reasonable limits’: improper, repetitive, or unfair questions, including those constituting ‘an unwarranted attack on the witness’ (for example, the unsubstantiated allegation of the witness’s unlawful or inappropriate conduct), are not welcome.\textsuperscript{266} Somewhat differently, questions relating to the

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\textsuperscript{259} Martić guidelines (n 223), para. 8; Kupreškić et al. character and *tu quoque* evidence decision, supra note 172; *Hadžihasanović and Kubura* decision on cross-examination (n 258), at 4.

\textsuperscript{260} Martić guidelines (n 223), para. 8; Delić guidelines (n 97), para. 9.

\textsuperscript{261} Martić guidelines (n 223), para. 14; Delić guidelines (n 97), para. 17.

\textsuperscript{262} Decision on Cross-Examination of Milorad Davidović, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, TC I, ICTY, 15 December 2005 (‘*Krajišnik cross-examination decision*’), para. 8 (‘The Defence has the right to ask a witness pointed questions in order to test his or her reliability and credibility, even though this may be an unpleasant experience for the witness.’).

\textsuperscript{263} Art. 22 ICTY Statute; Art. 21 ICTR Statute; Art. 17(2) SCSL Statute; Rule 90(F) ICTY RPE; Rule 90(F) ICTR RPE.


\textsuperscript{265} Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to add Wesley Clark, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, TC, ICTY, 16 February 2007, para. 27 (‘To restrict cross-examination to the subject matter predetermined by anyone other than the Chamber with the approval, at least tacit, of the Prosecution is inevitably unfair to the Defence. It would prevent them from challenging the honesty and reliability of the witness by looking at inconsistencies in what he may have said on matters beyond the permitted territory of the examination. It would also prevent the Defence from cross-examining on relevant matters favourable to the Defence case that are excluded by the restriction.’).

\textsuperscript{266} *Krajišnik* cross-examination decision, supra note 262, paras 9-10 (allegations that the witness has engaged in criminal activities and otherwise strong language (e.g. accusations of being a liar) may be allowed at cross-
preparatory meetings between the other party and a witness are generally admissible as they may go to the credibility of a witness. Given the presumption of professional integrity on the part of counsel, such questions should be limited to the number, dates, and duration of such meetings, unless there is a substantiated allegation of misconduct by counsel during proofing sessions. Finally, the cross-examining party may confront a witness with the testimony of another witness so as to impeach or challenge her or the testifying witness’ credibility. But the source of information may not be identified and the witness may not be asked to comment on the previous witness’ credibility or whether the witness agrees with her evidence.

The third category of matters within the scope of cross-examination in accordance with ICTY Rule 90(H)(i) and ICTR Rule 90(G)(i) includes issues relevant to the case for cross-examining party. A cross-examiner may ask questions that do not deal with matters raised during examination-in-chief and credibility but are expected by that party to support its case. Thus, in line with the principle of judicial economy, the witness called by one party who could also produce evidence relevant to the case for the other party, does not have to appear twice. While the defence is not so limited as to the scope of its cross-examination of the prosecution witnesses, the prosecution must normally contain its cross-examination on the issues relevant to its case within the boundaries of its case-in-chief as actually presented. When cross-examining defence witnesses, the prosecution may not venture into new areas in addition to those on which evidence has been led as part of its case-in-chief.

ICTY Rule 90(H)(ii) and ICTR Rule 90(G)(ii) require putting to the witness, who is being cross-examined on matters relevant to the case for the cross-examining party, the nature of that case which contradicts the evidence given by the witness. The rationale behind this requirement is to provide the witness with an opportunity to understand the context of the cross-examiner’s questions so as to avoid confusion and to better prepare him to examine when there are ‘reasonable grounds’ and a ‘solid basis’ for the cross-examining party to do so; thus ‘something more than mere hunch, innuendo, or unsubstantiated hearsay’ is required); Minutes of Proceedings, Prosecutor v. Bagosora et al., Case No. ICTR-96-41-T, TC I, ICTR, 9 May 2005, para 2 (b); Perišić cross-examination decision (n 239), para. 20 (finding that allegations of criminal conduct may indeed go to the witness’ credibility, reliability and assessment of his character); Delić guidelines (n 97), para. 10; Martić guidelines (n 223), para. 9; Stanišić and Župljanin guidelines (n 97), para. 16. See also Decision on Radivoje Miletić’s Interlocutory Appeal, Prosecutor v. Tolimir et al., Case No. IT-04-80-AR73.1, AC, ICTY, 27 January 2006, para. 29 (on Trial Chamber’s discretion under Rule 90(F) to regulate the examination so as to avoid repetitive questioning during cross-examination).

Decision on the Bizimungu’s Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor’s Objection Raised During the 3 March 2005 Hearing, Prosecutor v. Bizimungu et al., Case No. ICTR-00-56-T, TC II, 1 April 2005, paras 34-5 and 37; Decision on Objection to Question Put by Defence in Cross-Examination of Witness TF1-227, Prosecutor v. Brima et al., Case No. SCSL-04-16-T, TC II, SCSL, 15 June 2005, para. 20.

Delić guidelines (n 97), para. 11; Prlić et al. guidelines (n 90), para. 9.I.f.

Delić guidelines (n 97), para. 11; Martić guidelines (n 223), para. 12; Stanišić and Župljanin guidelines (n 97), para. 22; Transcript, Prosecutor v. Simić et al., Case No. IT-95-9-T, TC II, ICTY, 4 June 2002, at 8820-1; 13 March 2003, at 16636; Transcript, Prosecutor v. Brcin et al., Case No. IT-99-36-T, TC II, ICTY 14 October 2002, at 10651-2 and 10654; Transcript, Prosecutor v. Kvočka et al., Case No. IT-98-30/1, TC I, ICTY, 28 August 2000, at 4221; Transcript, Prosecutor v. Krajišnik, Case No. IT-00-39-T, TC I, ICTY, 5 December 2005, at 19215.

Hadžihasanović and Kubura decision on cross-examination (n 258), at 3; Prlić et al. cross-examination decision (n 254), para. 10.

Prlić et al. cross-examination decision (n 254), para. 10.

Cf. ibid., para. 12 (‘The presentation of evidence [in the order of Rule 85 (A)] necessarily implies that the Prosecution has already closed its case when it is cross-examining witnesses called by the Defence. Accordingly, … the drafters of Rule 90 (H) (i) intended to authorize the Prosecution to ask questions in cross-examination which relate to its case, even though it has concluded its case.’).

comment on the contradictory version of the events.\textsuperscript{274} This enhances both the efficiency and fairness of the proceedings because the witness does not have to reappear and the Chamber is in a position to assess the credibility of her evidence more accurately.\textsuperscript{275} The fairness is also towards the calling party: were the cross-examining party not under the duty to indicate which aspects of the witness testimony are being contested, the calling party would be led to believe that the opponent is not going to contest these matters and would fail to call other corroborating evidence due to the perceived lack of the need for it.\textsuperscript{276}

The tribunals have held consistently that the clarification pursuant to Rule 90(H)(ii) should present the witness with the \textit{substance} of the contradictory evidence and not every detail it takes issue with.\textsuperscript{277} In the \textit{Brđanin} case, the defence objected to the duty under ICTY Rule 90(H)(ii) to disclose the general nature of its case as violating the rights of the accused under Article 21 of the Statute, including the right to communicate with counsel and the right to silence. In rejecting this argument, both Trial and Appeal Chambers held that the said obligation enables the trial court to control the presentation of evidence. It is akin to the rules on delivery of pre-trial briefs which are to reveal, ‘in general terms, the nature of the accused’s defence’, and to disclosure of alibi or any special defence, in that the said Rule similarly ‘mandate[s] that the Defence contribute to the success of a fair trial and participate positively at all stages of the proceedings’.\textsuperscript{278}

While the Trial Chambers did not read into Rule 90(H)(ii) a judicial duty to compel a party to present the nature of its case in contradiction of the evidence of prosecution witnesses, the jurisprudence does attach certain negative consequences to the breach of that Rule.\textsuperscript{279} Often such failure, particularly in the case of the defence, will be the result of late investigations. Only after the prosecution witness has been led, the defence may become aware of information that ought to have been put to the witnesses for her comment and will


\textsuperscript{275} \textit{Prlić et al.} decision on modes of interrogating (n 236), para. 13; \textit{Brđanin and Talić} Rule 90(H)(ii) trial decision (n 274), para. 13; Decision on the Interlocutory Appeal against a Decision of the Trial Chamber, as of Right, \textit{Prosecutor v. Brđanin and Talić}, Case No. IT-99-36-AR73.7, AC, ICTY, 6 June 2002 (‘Brđanin and Talić Rule 90(H)(ii) appeal decision’), at 4 (ICTY Rule 90(H)(ii) ‘seeks to facilitate the fair and efficient presentation of evidence whilst affording the witness being cross-examined the possibility of explaining himself on those aspects of his testimony contradicted by the opposing party’s evidence, so saving the witness from having to reappear needlessly in order to do so and enabling the Trial Chamber to evaluate the credibility of his testimony more accurately owing to the explanation of the witness or his counsel’).

\textsuperscript{276} \textit{Brđanin and Talić} Rule 90(H)(ii) trial decision (n 274), paras 13 and 17 (the Rule among others ‘ensures that the trial proceeds fairly and in accordance with the spirit of transparency and reciprocal disclosure … and that proceedings … do not end up being a hide-and-seek exercise or a fishing expedition or, worse still, a conjuring act.’).

\textsuperscript{277} \textit{Delić} guidelines (n 97), para. 12; \textit{Martić} guidelines (n 223), para. 10; Decision on Partly Confidential Defence Motion regarding the Consequences of a Party Failing to Put its Case to Witness Pursuant to Rule 90 (H) (ii), \textit{Prosecutor v. Orić}, Case No. IT-03-68-T, TC II, ICTY, 17 January 2006 (‘Orić Rule 90(H)(ii) decision’), at 2; \textit{Stanišić and Župljanin} guidelines (n 97), para. 20; \textit{Brđanin and Talić} Rule 90(H)(ii) trial decision (n 274), para. 14; Decision on Prosecution’s Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii), \textit{Prosecutor v. Stanišić and Župljanin}, Case No. IT-08-91-T, TC II, ICTY, 12 May 2010 (‘Stanišić and Župljanin Rule 90(H)(ii) decision’), para. 17; \textit{Karera} appeal judgement (n 240), para. 26.

\textsuperscript{278} \textit{Brđanin and Talić} Rule 90(H)(ii) appeal decision (n 275), at 4; \textit{Brđanin and Talić} Rule 90(H)(ii) trial decision (n 274), para. 15.

\textsuperscript{279} \textit{Stanišić and Župljanin} Rule 90(H)(ii) decision (n 277), para. 20.
later seek to present contradictory evidence without having put its case to that witness. In determining the appropriate remedy, the Chamber will evaluate the weight of the evidence presented by the defence to contradict the prosecution witness, the nature of which has not been put to that witness, and consider that the prosecution witness did not have an opportunity to comment on that contradictory evidence. The Chamber might also ascribe no probative value to the contradictory defence evidence the nature of which was not put to the prosecution witness while on the stand. Finally, should the cross-examining party fail to satisfactorily put to the witness the nature of its case, in grave circumstances it may also be prevented from adducing the contradicting evidence and from recalling the witness.

Generally, the Chambers were reluctant to issue abstract guidelines and admitted that some flexibility is called for in the application of the rule providing for the duty to put the case for cross-examining party to a witness (so that the need for a given line of questioning is understood by that witness), given the circumstances of each trial. As recognized by the Milutinović Trial Chamber, it may be unrealistic in large-size multiple-accused cases to expect the cross-examining party to cross-examine on every point challenged and hence there will inevitable be situations in which a party misses the point it would have wished to cross-examine the witness on. In particular, where it is obvious in the circumstances of the case that the account of the witness is being challenged, there is no need for the cross-examining party to waste time putting its case to the witness. This is because the contradictory evidence will later be tendered, or has already been tendered, before the Trial Chamber. Finally, when the accused testifies as witness in his own defence, the rule requiring the cross-examining party to put his case to the witness does not apply, given the sufficient familiarity of the accused with the case against him.

D. Re-examination

Where the parties have conducted cross-examination, they will often wish to use the opportunity provided for in Rule 85(B) to re-examine their witness. At re-examination, the

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280 The scenario described and denounced in Milutinović et al. trial judgement (n 143), para. 52.
281 Stanišić and Župljanin Rule 90(H)(ii) decision (n 277), para. 21; Milutinović et al. trial judgement (n 143), paras 51-2.
282 Popović et al. order on Rule 90(H)(ii) (n 274), para. 3; Stanišić and Župljanin Rule 90(H)(ii) decision (n 277), para. 21.
283 Ibid.; Brdanin and Talić Rule 90(H)(ii) trial decision (n 274), para. 20 (the Chamber expressing intention to eliminate ‘such situations whereby a witness is excused and subsequently the cross-examining party brings forward evidence that tends to contradict the testimony of the witness in question, without giving that witness an opportunity to provide an explanation’; Orić Rule 90(H)(ii) decision (n 277), at 2.
284 Brdanin and Talić Rule 90(H)(ii) trial decision (n 274), paras 13 and 14; Orić Rule 90(H)(ii) decision (n 277), at 1-2; Popović et al. order on Rule 90(H)(ii) (n 274), para. 2; Stanišić and Župljanin Rule 90(H)(ii) decision (n 277), para. 17; Karera appeal judgement (n 240), para. 26; Krajišnik appeal judgement, supra note 274, para. 368.
285 Milutinović et al. trial judgement (n 143), para. 51 (suggesting as a more ‘realistic approach’ that ‘the cross-examiner [must] prioritise his cross-examination and to challenge the more significant evidence against him and, where the witness is able to give evidence relevant to the cross-examiner’s case, to put to that witness the nature of that case that is in contradiction of the evidence given by the witness, pursuant to Rule 90 (H) (ii).’).
286 Stanišić and Župljanin Rule 90(H)(ii) decision (n 277), para. 17; Karera appeal judgement (n 240), para. 26; Krajišnik appeal judgement (n 274), para. 368. Cf. Browne v. Dunn (n 251), at 71 (holding that putting the case of the cross-examining party is unnecessary when it is ‘otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it’ Per Lord Herschell).
287 Popović et al. order on Rule 90(H)(ii) (n 274), para. 4; Stanišić and Župljanin Rule 90(H)(ii) decision (n 277), para. 17.
288 Karera appeal judgement (n 240), para. 27; Krajišnik appeal judgement (n 274), para. 369-70.
party who has called and examined-in-chief a witness may put questions to correct matters or new fact arising out of cross-examination.\textsuperscript{289} Re-examination tends to be focused on the weak points in the testimony that surfaced at cross-examination, in order to repair the damage done to the parties’ case during that round. The calling party will normally have the last word with its witness.\textsuperscript{290} This means that re-examination in most cases concludes the testimony of a witness, unless new issues have arisen at re-examination, which gives the other party an opportunity to further cross-examine in relation to those issues.

While the party may re-examine its witness as of right, the tribunals in question developed some guidelines in their case law regarding the scope of re-examination and appropriate questions. Importantly, re-examination shall be strictly limited to questions and issues raised during the cross-examination.\textsuperscript{291} Before re-examination, the parties are requested to specify points in the cross-examination it relates to in order to avoid needless consumption of time and unfounded objections.\textsuperscript{292} As is the case with examination-in-chief and cross-examination, questions put during re-examination should be formulated in a clear and succinct manner.\textsuperscript{293}

E. Further examination

The ICTY, ICTR and SCSL Rules do not expressly provide for the analogue of ‘re-cross-examination’. As noted, the common law rule is that the testimony of a witness ends with re-examination and, in the absence of new issues, a party’s repeated examination of its witness concludes testimony.\textsuperscript{294} However, where new evidence is introduced by a calling party, the opposing party is entitled to further cross-examine the witnesses thereon.\textsuperscript{295} Consequently, the ad hoc tribunals’ jurisprudence recognizes that a party may exceptionally be allowed to conduct ‘further cross-examination’ when the new material is introduced or new matters are raised by the Chamber’s questions during re-examination.\textsuperscript{296} The Chamber will grant leave to further cross-examine only subject to the showing of exceptional circumstances and may limit the matters to be covered.\textsuperscript{297} At the SCSL, the Chambers held that permission will be granted to counsel to re-open cross-examination where the interests of justice and fairness so

\begin{itemize}
\item \textsuperscript{289} \textit{Delalić} \textit{et al.} decision on presentation of evidence (n 66), para. 22. Cf. P. Murphy, \textit{A Practical Approach to Evidence} (London: Blackstone, 1988) 460 (‘the process whereby a party calling a witness may seek to explain or clarify any points that arose in cross-examination and appear to be unfavourable to his case. Re-examination is, therefore, possible only where there has been cross-examination and is limited to matters raised in cross-examination: it is not an opportunity to adduce further evidence in chief.’).
\item \textsuperscript{290} \textit{Delalić} \textit{et al.} decision on presentation of evidence (n 66), para. 30.
\item \textsuperscript{291} Stanišić and Župljanin guidelines (n 97), para. 23; \textit{Delić} guidelines (n 97), para. 16; \textit{Prlić et al.} defence guidelines (n 96), para. 9.
\item \textsuperscript{292} \textit{Prlić et al.} defence guidelines (n 96), para. 9.
\item \textsuperscript{293} \textit{Prlić et al.} guidelines (n 90), para. 9.I.g.
\item \textsuperscript{294} \textit{Delalić} \textit{et al.} decision on presentation of evidence (n 66), para. 30 (‘as a general rule the testimony of a witness ends with his re-examination, absent any new matter during re-examination’), referring to \textit{Alford v. US}, 282 US 687, 694 (1931) and \textit{Prince v. Samo} (1838) 7 Ad. & E. 627 (England and Wales).
\item \textsuperscript{295} \textit{Ibid.}
\item \textsuperscript{296} \textit{Ibid.} (noting that ‘further cross-examination is to re-examination what cross-examination is to examination-in-chief’ and ‘[h]ence, to deny further cross-examination when new material is raised in re-examination is tantamount to a denial of the right to cross-examination on such new material’); Decision on Order of Presentation of Evidence, \textit{Prosecutor v. Kupreškić et al.}, Case No. IT-95-16-T, TC II, ICTY, 21 January 1999 (‘\textit{Kupreškić et al.} decision on presentation of evidence’), at 3-4 (confirming the Prosecution’s duty to disclose to all accused at the earliest available opportunity and, at the latest, prior to cross-examination, any new material); Order on the Prosecution’s Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-Examination by the Prosecution and counsel for the Co-Accused, \textit{Prosecutor v. Delalić et al.}, Case No. IT-96-21-T, TC II quater, 3 April 1998, at 3.
\item \textsuperscript{297} \textit{Prlić et al.} defence guidelines (n 96), paras 2 and 10.
\end{itemize}

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demand, if sufficient grounds are provided for the Trial Chamber to exercise its discretion in this regard.298

In one early ICTY case, the defence contended that refusing further cross-examination after re-examination violates the principle of equality of arms enshrined in Article 21(4)(e) of the Statute which guarantees the accused the right 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, to be exercised in full equality.299 The Trial Chamber rejected the argument on the ground that the equality of arms is embedded in the order of presentation of evidence under Rule 85(A), according to which the defence is entitled to examine-in-chief and re-examine its witnesses and to cross-examine the prosecution witnesses in full equality with the prosecutor.300

F. Extra-sequential questions by the Judges

While it is for the party calling the witness to examine her in chief, Rule 85(B) of the ICTY, ICTR, and SCSL RPE authorize judges to put any question at any time to the witness. The judicial mode of questioning is distinct from the modes available to the parties. First, the Rule does not employ the expressions ‘examination-in-chief’ or ‘cross-examination’ in relation to the judges who are therefore not constrained in adopting any of those or perhaps alternative forms of questioning. As noted, the initial questioning of Chamber witnesses by judges will be reminiscent of examination-in-chief, but possibly with modifications such as the witness’s free narrative at the start of testimony. Formal rules associated with conventional common law forms of partisan questioning do not apply to the judicial questioning.301

Secondly, Rule 85(B) imposes no temporal limitations with judicial questions, which can be posed before, after, or during examination-in-chief, cross-examination, or re-examination. The possibility for the judges to ask witnesses questions in the course of the examination by counsel can be inferred from the combined reading of Rules 85(B) and 90(F). The power to exercise control over the mode and order of interrogation in order to make it effective for truth-finding and to avoid needless consumption of time may entail the need for the judges to intervene in the examination by counsel in order to ask clarifying questions. Thirdly, since Rule 85(B) leaves it to the judges to determine how to pose their question to the witness, as such questions are exempt from the rules such as the prohibition of leading or closed questions during examination-in-chief.

An early ICTY decision in Čelebičići clarified that the role of the judge emulates that of ‘an impartial arbiter [who] may put questions to a witness, during examination-in-chief, cross-examination or re-examination, to clarify issues which remain unclear after an answer by the witness.’302 Given that the perceptions on the proper judicial role at trial and in relation to witness examination differ significantly between the common law and civil law traditions, the scope, purpose, and appropriate form of judicial questioning have been controversial issues before the tribunals. The practice has been far from uniform and judicial questioning styles have varied by Chambers, ranging from passive to pro-active. This


299 Delalić et al. decision on presentation of evidence (n 66), para. 29.

300 Ibid. (finding no violation of Art. 21(4)(e)).

301 Krajišnik chamber witnesses decision (n 212), para. 16(c) (“The witness will be examined by the judges in relation to the subject-matter of the statement, and in relation to other matters raised by answers elicited by the Chamber. The constraints on questioning a witness which are placed upon the party calling the witness shall not apply to the judges.”).

302 Ibid., para. 26.
depended on variable and accidental factors, including the national and professional backgrounds of the judges and especially that of the presiding judge, individual preferences of the judges, and the Chamber’s collective dynamics.\(^303\)

Subject to individual styles and professional habits of the judges, judges with a common law background can be expected to prefer to limit their questions to those that are absolutely necessary in order to clarify a certain issue. It should be recalled that in adversarial systems judicial passivity tends to be seen as indicative of impartiality and fits better in the approach reserving the parties a leading role in presenting evidence (while judicial proactivity will be exploited by counsel as the indicia of bias).\(^304\) By contrast, judges hailing from the ‘inquisitorial systems’, in particular judges with previous bench experience, are more likely to be proactive in conducting questioning without feeling deferred by the risk of bias allegations.\(^305\) In light of the \textit{sui generis} rather than purely adversarial nature of the tribunal proceedings, Rule 85(B) is open-textured and may accommodate these opposing judicial styles, allowing judges to opt for the most fitting one in the circumstances of the case. This flexibility is also fraught with risks of unfortunate or controversial choices regarding the timing and nature of judicial questions.\(^306\) At times, this ambiguity has generated tensions in the courtroom between counsel and the bench as counsel deemed extensive judicial questioning to impair the fairness and efficiency of the testimonial process.

For example, if a civil law trained international judge intervenes in the examination-in-chief or cross-examination of a witness, she might unknowingly disrupt the careful attempt by counsel to develop a certain line of questioning and thus interfere with the trial strategy of the party.\(^307\) Conversely, even though formally authorized to question witnesses and intervene in the counsel’s examination, a common law judge who used to sitting passively in a domestic courtroom might be not keen to intervene in an ineffective examination by counsel out of fear of being perceived as wishing to help one of the parties.\(^308\) This comparative mismatch may well be overstated: it is certainly a requisite of judicial competence at common law for the judge to be able to timely direct counsel to adjust a line of questioning that is not useful. But indeed there is now some empirical rather than merely anecdotal evidence that the ICTY and ICTR judges’ style of questioning in


\(^{304}\) See n 30.


\(^{306}\)Nsereko, ‘Rules of Procedure and Evidence’ (n 62), at 538 (recommending ICTY judges to allow the parties to conduct questioning and confine themselves to questions meant to clarify ambiguities).

\(^{307}\) This is the scenario described in Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’ (n 305), at 90 (‘such questioning may throw off the rhythm of the prosecution’s or the defence’s case presented in an adversarial mode, casting the judge in the role of an unwanted guest at the party. …[W]hen the judge steps in and asks the ultimate blunt conclusionary questions the prosecution (or the defence) have slowly and painstakingly working toward, the lawyer that presented the witness must scramble to get back control of the case.’).

\(^{308}\) See H. Morrison, ‘The Quest for Justice’, \textit{Counsel}, July 2001, at 14-5, cited in Wald, ‘Dealing with Witnesses in War Crime Trials’ (n 146), at 232 (‘common law judges, unused to the freedom of judicial intervention that is second nature of their civil judicial brethren, have on occasion stayed unhelpfully out of the area when civil law practitioners with no proper understanding or experience of cross-examination have allowed damning testimony to go unchallenged.’)
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influenced by their background.\textsuperscript{309} Besides the statutory guarantees of impartiality as interpreted in the jurisprudence which may be enforced on appeal,\textsuperscript{310} there is no control over the nature and scope of judicial questions as the judges are masters of the trial regime. For tactical considerations, the parties will often be unwilling to raise objections to the questions asked by the judges because any dividends of such objections are insignificant as compared to tensions or irritancy this may cause.\textsuperscript{311}

Therefore, there is a dearth of relevant ICTY, ICTR, and SCSL case law clarifying the admissible scope, subject-matter, and tone of judicial questions. The \textit{Rutaganda} appeal judgement provides a limited yet useful guidance in this regard. In that case the appellant alleged the lack of impartiality on the part of the Trial Chamber and complained that what he called his ‘cross-examination’ by the judges during his examination-in-chief and subsequent cross-examination as being in violation of fair trial.\textsuperscript{312} In relation to a significant number of questions asked by Judges Kama and Aspegrén during examination-in-chief (about fifty questions), the Appeals Chamber confirmed that ‘it is up to the Judges to ask any questions they deem necessary for the clarification of testimonies and for the discovery of the truth’. Moreover, it found no indications of bias or special skepticism in the judicial questions but rather considered them as attempts to elicit clarifications from the accused following his lengthy testimony and sometimes evasive or irrelevant answers.\textsuperscript{313} In rejecting the alleged bias in connection with the tone of the presiding judge’s questions and reactions to the answers given by the appellant, the Appeals Chamber found itself in a somewhat awkward situation of having to interpret those questions and reactions in the context of the trial record and other circumstances.\textsuperscript{314} The Chamber considered judicial questions asked at cross-examination to be the questions testing witness credibility and thus ‘fall[ing] entirely within the ambit of the Judge’s duty to contribute to the discovery of the truth’.\textsuperscript{315} While regretting some of the attitudes taken by the Presiding Judge of the Trial Chamber, the Appeals Chamber concluded that no bias in favour of the prosecutor could be discerned by a ‘reasonable and informed observer’ in the relevant judicial questions and comments, explaining them rather by the judge’s personal style and civil law background.\textsuperscript{316}

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\textsuperscript{310} Judgement, \textit{Prosecutor v. Furundžija}, Case No. IT-95-17/1-A, AC, ICTY, 21 July 2000, para. 189 (‘a Judge should … be subjectively free from bias, … there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias’). The perception of bias has been described as ‘the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgment) other than the party to the proceedings: Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, \textit{Prosecutor v. Brdanin and Talić}, Case No. IT-99-36-T, TC II, ICTY, 18 May 2000, para. 15; Decision on the Defence Application for Withdrawal of a Judge from the Trial, \textit{Prosecutor v. Krajisnik}, Case No. IT-00-39-T, TC I, ICTY, 22 January 2003, para. 14.

\textsuperscript{311} Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’ (n 305), at 90 (‘Counsel are understandably hesitant to correct the judge and, candidly, the judges do not always welcome such interruptions.’)


\textsuperscript{313} \textit{Ibid.}, para. 111.

\textsuperscript{314} Besides finding that many of Judge’s Kama questions and remarks fell within the truth-finding mandate of the Chamber and were not inappropriate, the Appeals Chamber commented that at least some of them were not ‘particularly judicious’, ‘unfortunate in that [they] could lead to confusion’ and caused by ‘irritation due to the length of the trial and the difficulty in bringing it to an end within a reasonable time’: \textit{ibid.}, paras 112-3, 115, and 124.

\textsuperscript{315} \textit{Ibid.}, para. 118.

\textsuperscript{316} \textit{Ibid.}, paras 116, 117, and 125.

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Similarly, in Hadžihasanović and Kubura, the ICTY dealt with the defence request for clarification of the Trial Chamber’s objective in its questions to witnesses. The Trial Chamber reminded that from the commencement of the trial it had explained to each witness that it might ask questions in order to clarify their answers. It furthermore inferred its power to interrogate on the matters indicated by the defence as controversial, holding that it is ‘fully entitled to put questions to witnesses in order to fulfil its duty in the truth finding process’. While recognizing that it may sometimes be difficult for the parties to understand why certain questions are asked by the Chamber, it held that the court’s truth-finding duty is the sole purpose. This truth-finding mandate makes it apposite to resort to Rule 85(B) power whenever ‘the Chamber is faced with contradictions between witness statements, between a witness statement and a document in the case file, or in order to assess the content of a document’.

The similarity in the form and substance of questions the Chamber put to the witnesses for both parties was considered to indicate the compliance by the judges with their duties of ‘impartial arbitrators’ as established in the previously-mentioned Delalić et al. decision. The additional safeguard neutralizing the possible adverse effects of judicial questioning on the party’s case is the practice of allowing the parties to question the witnesses further after the Judges have asked their questions. This enables the party calling a witness to have the last word with a witness and both parties to correct or supplement the answers provided by the witness or let her give any additional information to clarify matters for the Chamber in light of its questioning.

Thus, the Hadžihasanović Chamber firmly embedded its power of questioning witnesses in the truth-finding mandate of the court and reiterated that there is an obligation on the judges to ensure that the substance of their questions and the manner in which they are asked are aligned with the pledge of impartiality. It also clarified the principle according to which the judges ought not to be the last to question a witness: this opportunity is normally to be reserved to the party calling the witness. This general approach was upheld by the Appeals Chamber in the same case.

In particular, the Appeals Chamber found that the judges may ask any questions deemed necessary for the clarification of testimonies or for the discovery of the truth, including issues not raised by the parties and, in case of expert witnesses, not covered by the expert report, provided that such questioning does not lead a ‘reasonable and properly informed observer to apprehend bias or that [the accused] suffered any prejudice’.

G. Specifics of examination in multiple-defendant cases

The special circumstances of joint multiple-accused trials brought about by severalty of defence cases result in a more complex sequence of questioning. This is due to the fact that certain defence witnesses may be common to some or all accused, while others will be called by individual accused and be adversary to other accused. The Trial Chamber is confronted with a challenging task of guaranteeing a fair trial to each accused and ensuring that each of them has the same rights he or she would have enjoyed in a separate trial. At the same time, the overall time needed for cross-examination by the defence side may grow

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317 Decision on Defence Motion Seeking Clarification of the Trial Chamber’s Objective in its Questions Addressed to Witnesses, Prosecutor v. Hadžihasanović and Kubura, Case No. IT-01-47-T, TC II, ICTY, 4 February 2005 (‘Hadžihasanović and Kubura judicial questioning decision’).
318 Ibid.
319 See supra note 302.
320 Hadžihasanović and Kubura judicial questioning decision (n 317).
322 Rule 82 (1) ICTY RPE; Rule 82 (1) ICTR RPE; Rule 82 (1) SCSL RPE.
in proportion to the number of defendants in view of the need for the defence team for each accused to cross-examine prosecution witnesses and witnesses for the co-accused.

In order to expedite the proceedings, the tribunals have sought to adjust the sequence of questioning and duration of examination-in-chief of joint defence witnesses and the cross-examination of prosecution witnesses and witnesses called by other co-accused accordingly. After the examination-in-chief of a defence witness, the witness would be cross-examined by the defence counsel of the co-accused, if they choose to do so, then by the prosecution, and then re-examined by the accused on whose behalf the witness was called. The defence teams sharing a witness would normally be expected to present that witness in a single examination-in-chief. While a jointly called witness may not be cross-examined by a calling defence team, other teams may do so prior to the cross-examination by the prosecutor. For common witnesses, leave to object to questions during cross-examination is not required; the objections raised by counsel other than the one who has called the witness should be addressed through consultation with the latter.

As regards defence cross-examination in the multiple-accused cases, the Chambers have acknowledged the difficulty of determining the appropriate amount of time for cross-examination in advance of examination-in-chief, as it would normally depend on what the witness says in the courtroom and how that would affect the accused. But in accordance with the general principle regarding the length of cross-examination, the total time allotted for cross-examination of a witness by all defence teams shall in principle not exceed the time for the examination-in-chief by the prosecution, unless specific circumstances warrant extension. The fact that each individual team gets only a part of the overall time available to the defence for cross-examination is in line with the interpretation of the principle of equality of arms by the ICTY Appeals Chamber, which required to ensure ‘basic proportionality, rather than a strict principle of mathematical equality’ in the allocation of time.

In Prlić et al., the ICTY Trial Chamber ordered the defence teams of co-accused to limit the length of their cross-examination to the calculated percentage of the time used for examination-in-chief (50%), whereas granting the prosecution 100% of the time used for examination-in-chief to cross-examine defence witnesses. The Trial Chamber explained this time limit on cross-examination by co-accused by the fact that the rationale of such cross-examination, unlike in case of the prosecutor, is to safeguard their right to a fair trial based on the number of defendants in view of the need for the defence team for each accused to cross-examine prosecution witnesses and witnesses for the co-accused.

References:

323 Kupreškić et al. decision to summon witnesses (n 215); Kupreškić et al. decision on presentation of evidence (n 323), at 4; Prlić et al. defence guidelines (n 96), para. 2.
324 Order Concerning the Presentation of Evidence and the Conduct of Parties during the Defence Cases, Prosecutor v. Popović et al., Case No. IT-05-88-T, TC II, ICTY, 26 May 2008 (‘Popović et al. defence case decision’), para. II (d) and (e); Norman et al. decision on evidentiary objections (n 255), at 3 (‘when a witness is not a common witness, and has not been called by the Accused .... Counsel are expected to address the interests of their client through cross-examination’).
325 Norman et al. decision on evidentiary objections (n 255), at 3.
326 Prlić et al. guidelines (n 90), para. 5. See also Popović et al. defence case decision (n 324), para. II.c. (with reference to assurances of the defence teams that they would use their best effort to coordinate amongst themselves so as to avoid unnecessary or repetitive presentation of evidence, the Chamber decided not to set a specific time limit for the presentation at the pre-defence stage, retaining the right to revisit the issue should the approach prove not to be conducive to effective trial management).
327 Prlić et al. appeal decision on cross-examination (n 239), at 3; Decision on the Implementation of the Decision of 8 May 2006 on Time Allocated for Cross-Examination by Defence, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 12 July 2006 (‘Prlić et al. trial decision on cross-examination’), at 2; Prlić et al. guidelines (n 90), para. 5; Martić guidelines (n 223), para. 11; Transcript, Prosecutor v. Jelisić, Case No. IT-95-10, TC I, ICTY, 7 September 1999, at 1063. In certain cases, the TCs requested the parties to limit the length of cross-examination to 60% of the time used for examination-in-chief, but this rule was interpreted flexibly.
329 Prlić et al. defence guidelines (n 96), paras 14-5.
should the witness give incriminating evidence against the calling accused. The Appeals Chamber endorsed this distribution of time, ruling that the proportionate rather than equal allocation of time for the presentation of case-in-chief also applies to the prosecution cross-examination of witnesses in multiple-accused cases. The reason for that is that whereas each accused will use cross-examination of the prosecution witnesses to challenge evidence relating to his own individual criminal responsibility, the prosecution will generally aim to undermine the entirety of the defence witness’s evidence in its cross-examination.

Unless defence teams reach an agreement according to which some counsel will put questions on behalf of the others, the time would be split evenly among the defence counsel. Moreover, an unequal allocation of time is warranted if a witness testimony bears directly upon the responsibility of one or several accused, in which case the defence counsel for that or those accused would lead cross-examination and take most time while the others would divide the remaining time amongst themselves. Normally, the schedule is not rigid and may be varied by the Chamber if necessary, whereas the time allocation can be varied by agreement among the counsel.

The special nature of multi-accused trials surfaces also in relation to the issue of the admissible scope of cross-examination. Cross-examination by the accused, other than who has called the witness, does not have to be limited to issues arising out of examination-in-chief and may legitimately pursue the goal of eliciting evidence in favour of the cross-examining accused. This type of questioning is a mutated form of cross-examination which emulates examination-in-chief, and therefore leading questions, which generally aim to undermine the credibility of testimony, as well as repetitive questions are to be avoided. Where evidence prejudicial to other co-accused arises out of cross-examination of a defence witness by the prosecution, the relevant co-accused may request the Chamber to conduct further questioning of that particular witness in order to clarify the matter.

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330 Pribić et al. defence guidelines (n 96), para. 15 (‘Unlike the Prosecution, upon which the burden of proof rests and which, as a result, must prove all of the necessary facts to establish the guilt of the Accused, the other Defence teams are not adversaries of the party presenting the witness, even though they may pursue a different defence strategy which may possibly come into conflict with that of the party presenting the witness.’).
331 Decision on Petković’s and Praljak’s Appeals Against the Trial Chamber’s Decision Adopting Guidelines for the Presentation of Defence Evidence, Prosecutor v. Pribić et al., Case No. IT-04-74-AR73.8, AC, ICTY, 18 July 2008 (‘Pribić et al. defence guidelines appeal decision’), para. 20. See Decision on Defendant’s Appeal against “Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge”, Prosecutor v. Pribić et al., Case No. IT-04-74-AR73.7, AC, ICTY, 1 July 2008, 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 circumstance that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual accused’).
332 Pribić et al. defence guidelines appeal decision (n 331), para. 20.
333 Pribić et al. defence guidelines (n 96), para. 15.
334 Pribić et al. appeal decision on cross-examination (n 239), at 3; Pribić et al. trial decision on cross-examination, supra note 327, at 2; Pribić et al. guidelines (n 90), para. 5.
335 Pribić et al. appeal decision on cross-examination (n 239), at 4; Pribić et al. defence guidelines (n 96), para. 16 (ruling inter alia that a defence team may submit a motivated request for additional time to cross-examine a defence witness indicating which matters it wishes to raise with the witness).
336 Norman et al. decision on evidentiary objections (n 255), at 3; Decision on Modalities for Examination of Defence Witnesses, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 26 April 2005 (‘Bagosora et al. examination decision’), para. 6.
337 Pribić et al. leading questions decision (n 231), para. 19 (‘the cross-examination dealing with a subject not raised in the direct examination is not a cross-examination strictly speaking, but an examination resembling the direct examination. Consequently, the rules of direct examination apply and leading questions are not permitted in this type of examination.’); Bagosora et al. examination decision (n 336), para. 6 (the extent and manner of questioning by other co-accused depends on the nature of the testimony given by the witness and the purpose of questioning, to be decided on a case-by-case basis).
338 Kayishema and Rucindana re-examination decision (n 131), para. 15 (noting that such questioning is not re-examination per se and retaining a degree of flexibility in the interest of fair proceedings, with regard to this aspect).
Chapter 10: Presentation and Examination of Evidence

By contrast, cross-examination by the prosecution is to be limited to issues arising out of the examination-in-chief or the subject-matter of the prosecution’s case-in-chief. The prejudice resulting from allowing the Prosecution, without giving prior notice, to elicit through cross-examination evidence incriminating the co-accused who has not called that witness and has not prepared for cross-examination, would outweigh the potential probative value of such evidence. Thus, apart from proving the existence of a JCE, the prosecution’s cross-examination may not have as an objective the eliciting of evidence against the co-accused who has not called the witness in question.

3.2.3 Presentation of documents and exhibits

Although documents and exhibits have always been an important part of the evidentiary process before the ad hoc tribunals and the SCSL, the presentation of such evidence is not regulated in the Rules, unlike the order and modalities of presenting testimonial evidence. As shown earlier, the evidentiary process is structured by the order of appearance of witnesses before the Trial Chamber, which indicates the primacy of testimonial evidence as an organizing principle of the trial process. The standards on the submission of documents and exhibits as developed in practice are entwined with the order in which the witnesses are to testify. A document or exhibit in principle may be admitted at any convenient time during trial, but there should be ‘a sufficient basis’ for the Chamber to believe that it satisfies the admissibility requirements of relevance and probative value under Rule 89(C). Such sufficient basis will normally be provided by an oral testimony or a written statement admitted pursuant to Rule 92bis or Rule 92ter that can explain to the judges the background of the exhibit and provide a justification of its relevance to the case.

Therefore, the regular procedure for the presentation of exhibits and documents is through the testimony of the witness who has certain relation to the evidentiary piece in issue. That witness can, for example be its author or someone else who is able to clarify its origins and content in order to provide information relevant to the exhibit’s reliability, relevance, or probative value. When conducting direct examination, the party must lay the source of the document, in order for that document to meet the required degree of reliability; when conducting cross-examination, it must lay the background and source of the document so as to allow the witness to recognize or reject the document. Where the requisite

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340 Norman et al., decision on cross-examination, supra note 238, paras 23-24.
341 Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table with Confidential Annexes A to E, Prosecutor v. Boškoski and Tarčulovski, Case No. IT-04-82-T, TC II, ICTY, 14 May 2007 (‘Boškoski and Tarčulovski exhibits decision’), para. 10; Decision on the Admission into Evidence of Documents Tendered from the Bar Table by the Prosecutor, Prosecutor v. Galić, Case No. IT-98-29-T, TC I Section B, ICTY, 11 September 2002 (denying the admission of a Prosecution-edited video footage and transcripts due to its irrelevance).
342 Boškoski and Tarčulovski exhibits decision (n 341); Prlić et al. defence guidelines (n 96), para. 27.
343 Decision on the Admission of Exhibits Tendered through Witness Davor Marijan, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, TC I Section A, ICTY, 3 October 2002 (‘Naletilić and Martinović exhibits decision’); in the same case, Naletilić and Martinović rejoinder exhibits decision (n 137); Decision II on the Admissibility of Certain Documents, Prosecutor v. Strugar, Case No. IT-01-42-T, TC II, ICTY, 9 September 2004 (‘Strugar admissibility decision’), para. 9 (‘While there is no explicit requirement in the Statute or the Rules that an exhibit must be admitted through a witness, the case law reflects the fact that, apart from a few special categories of documents, this is the usual and, in principle, the correct approach.’); Prlić et al. defence guidelines (n 96), para. 27; Delić guidelines (n 97), para. 22; Prlić guidelines (n 90), at 8; Decision on the Prosecution Motion to Admit Documentary Evidence, Prosecutor v. Milutinović et al., Case No. IT-05-87-T, TC III, ICTY, 10 October 2006, n49; Boškoski and Tarčulovski exhibits decision (n 341), para. 10.
344 Naletilić and Martinović rejoinder exhibits decision, supra note 137
relation between the witness and the exhibit is lacking, the Trial Chamber may disallow admission.\(^{345}\)

In order to satisfy the parameter of reliability, the party examining the witness must indicate the source of the document it intends to submit through her; if the party wishes to present the documentary exhibit via witness in the course of cross-examination, it must likewise lay the background and source thereof in order to allow the witness to recognize or reject the document.\(^{346}\) Whilst smaller portions a document may be read out by counsel, the Chambers have instructed the parties wishing to present passages of a long document to a witness to provide the relevant parts of the document to the witness and give him or her time to study it in court or during the break and then ask concise questions on the substance of the relevant parts of the documents.\(^{347}\) In the absence of exceptional circumstances and without leave, the parties have been disallowed to tender lengthy documents and books, where only portions thereof were relevant to the evidence of the witness through whom the document is tendered and requested to specify first which portions are sought for admission.\(^{348}\)

Similarly to the framework for testimonial evidence, the autonomy of parties in submitting documents and exhibits through a witness is limited by the duty to notify its intention to request the admission of such items in advance by way of filing with the Chamber the lists of documents and exhibits during the pre-trial stage.\(^{349}\) In principle, the party may only request the admission of exhibits included on the respective list, although during the trial it may also seek leave of the Chamber to add the earlier unnotified exhibits to the said list by a reasoned motion in writing.\(^{350}\) Furthermore, the parties are placed under an obligation to disclose to the other parties and the Chamber a list of all documents and exhibits they intend to tender in connection with the witness’ testimony, and to do so certain time in advance, which applies to the evidence used both during examination-in-chief and during cross-examination.\(^{351}\)

On the other hand, in the absence of a specific Rule requiring the presentation of documents and exhibits, it is no absolute requirement that such must be tendered during the examination of witnesses.\(^{352}\) The parties can also be allowed to submit them without, or prior to, the testimony of specific witnesses.\(^{353}\) This concerns situations in which relevance and reliability of an exhibit are sufficiently apparent to justify its admission without the need for any further evidence relating to the document.\(^{354}\)

\(\text{\footnotesize \(345\) Delić guidelines (n 97), para. 22.}\)

\(\text{\footnotesize \(346\) Naletilić and Martinović exhibits decision (n 343); Naletilić and Martinović rejoinder exhibits decision, ibid.; in the same case, Decision on the Admission of Exhibits Tendered through Witness ND and Damir Zorić, 14 June 2002 and Decision on the Admission of Exhibits Tendered through Witness Mladen Ancić, 4 October 2002.}\)

\(\text{\footnotesize \(347\) Martić guidelines (n 223), para. 15; Delić guidelines (n 97), para. 19.}\)

\(\text{\footnotesize \(348\) Martić guidelines (n 223), para. 16; Delić guidelines (n 97), para. 20.}\)

\(\text{\footnotesize \(349\) Prlić et al. defence guidelines (n 96), para. 26. See Rule 65ter(E)(iii) and (G)(ii) ICTY RPE and Rule 73bis(B)(iv) and 73ter(B)(iv) ICTR and SCSL RPE.}\)

\(\text{\footnotesize \(350\) Prlić et al. defence guidelines (n 96), para. 26.}\)

\(\text{\footnotesize \(351\) Prlić et al. defence guidelines (n 96), paras 28-9 (ordering the disclosures by the party presenting a witness to be effected two weeks in advance of the appearance of that witness and by the cross-examining party before the cross-examination begins).}\)

\(\text{\footnotesize \(352\) Strugar admissibility decision (n 343), para. 9. Prlić guidelines (n 90), para. 8 (‘there will be no blanket prohibition on the admission of evidence simply on the grounds that the purported author of that evidence has not been called to testify.’).}\)

\(\text{\footnotesize \(353\) Decision on Exhibits, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, TC I, ICTY, 19 July 2001, at 4 (a large number of documentary exhibits were tendered by the Prosecutor prior to the opening statement and admitted into evidence); Annex IV, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, TC III, ICTY, 26 February 2001, para. 27 (exhibits were tendered by the Prosecutor at the close of the case-in-chief and admitted into evidence in part).}\)

\(\text{\footnotesize \(354\) Boškoski and Tarčulovski exhibits decision (n 341), para. 13.}\)
Whenever a document or exhibit is not submitted through a witness, the parties do so by way of a written motion (‘admission from a bar table’). Where the party wishes to tender into evidence large passages of a document and particularly where it does not ask concise and specific questions on the information in the relevant document but merely requests a witness to verify the contents of the document, the Chambers have expressed preference for this mode of admission. The Trial Chambers require that such motion include, among others, the particulars and the description of the document, source of the exhibit and indicia of reliability, references to the relevant paragraphs of the indictment and the reasons why the exhibit is not introduced through a witness, and why it is important for the determination of the case. These stringent requirements follow from the need to ensure fair trial for the accused. This generally means that there must be an opportunity to test the relevant evidence in court; this imposes on the court an additional responsibility to see to it that evidence is admitted not through a witness for good reasons.

3.2.4 Procedure for the judgment of acquittal at the close of prosecution case

A. Origin and rationale

In the ad hoc tribunals and the SCSL, where the presentation of evidence is based on the two-case model, the Trial Chamber may acquit the accused after the prosecution completes the presentation of evidence in its case and before the defence opens its own case, if it is not satisfied that that evidence could secure conviction. This component of the trial process essentially is an interruption in the flow of presentation of evidence for purpose of deciding whether any evidence needs to be presented by the defence at all. It falls within the temporal scope of trial and, therefore, should be examined in the present Chamber, although it pertains to the sphere of decision-making rather than the presentation of evidence stricto sensu. This procedure on the motions for judgment of acquittal in the mid-trial phase is rooted in the practice of common law jurisdictions. There, a magistrate may enter an acquittal in the halfway stage of trial, or a judge may issue a direction to the jury to that effect in case the prosecution has not made out the case for the defense to answer. This determination is the question of law at the heart of the procedure known as ‘no case to answer’. The procedure draws upon the logic of the two-case structure and would normally—insofar as that logic applies—be unavailable in those civil law countries in which criminal trial is organized around one case and the evidence examined pertains to the case of the court. Absent direct analogues in civil law systems, with some exceptions among jurisdictions featuring jury as a trier of fact, motions for the judgment of acquittal after the

355 Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Halilović, Case No. IT-01-48-AR73.2, AC, ICTY, 19 August 2005, paras 16-17; Martić guidelines (n 223), para. 19; Delić guidelines (n 97), para. 19.
356 Martić guidelines (n 223), para. 19; Delić guidelines (n 97), para. 19 (holding that reading out such large passages in court would not be an efficient use of in-court time).
357 Ptić et al. defence guidelines (n 96), para. 35.
358 Strugar admissibility decision, supra note 343, para. 9.
360 Discussing the common law origin of the procedure, see Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 bis, Prosecutor v. Strugar, Case No. IT-01-42, TC II, ICTY, 21 June 2004 (‘Strugar Rule 98bis decision’), paras 10 and 12-16.
361 May and Wierda, International Criminal Evidence (n 65), at 127; Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 579-80. Remarkably, in Spain, a judge may dismiss the jury after the prosecution’s case should there be no evidence to support conviction: reported in Decision on Defence Motions for Judgment of Acquittal, Prosecutor v. Kordić and Čerkez, Case IT-95-14/2-T, TC III, 6 April 2000 (‘Kordić and Čerkez Rule 98bis decision’), para. 24.
close of prosecution case could be compared to pre-trial applications to the investigating judge for dismissal upon the completion of the dossier. The raison d'être of ‘no case to answer’ at common law is ensuring a division between the adjudication on facts and on the law as functions of the jury and professional judges respectively, as well as the bifurcation of trial into the guilt-determination and sentencing parts. From a common law perspective, a failure to respect this division between adjudicative functions would undermine fairness. It must therefore be ensured that at the close of the prosecution case the jurors are ‘not left with the evidence which cannot lawfully support a conviction’, whereas the judge should not usurp the jury competence to determine credibility and reliability of evidence.

In common law jury trials, the standard of proof applicable to ‘no case to answer’ determinations falls short of demanding the assessment of the credibility of evidence and thus is less exacting than ‘beyond reasonable doubt’ required for the verdict of guilty. Nevertheless, in a sense, such an assessment forms part of ‘no case to answer’, for the reason that a ‘judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt’. In England and Wales, ‘no case’ motions are granted, firstly, for the lack of evidence of crime and, secondly, if the evidence is weak, vague, or inconsistent with other evidence and, taken at its highest, is such that a jury could not properly convict on it. However, a judge may not stop the case halfway if the strength or weakness of the evidence depends on the view to be taken of a witness’s reliability or other matters within the exclusive purview of the jury and ‘where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty’. In the United States, the standard of review under Rule 29 of the Federal Rules of Criminal Procedure, in the context of ‘Motions for a Judgement of Acquittal’, is formulated along similar lines: ‘When a defendant moves for a judgement of acquittal, the Court must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.’

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638 Ibid.
Australia, a strict distinction between the jury and judicial competences entails that a verdict of not guilty should ensue in case a fundamental defect in the evidence, taken at its highest, fails at sustaining the opposite verdict. The question for the judge to answer is whether there is evidence legally capable of serving as the basis for a conviction, not ‘whether the evidence is so lacking in weight that a conviction based upon it would be unsafe or unsatisfactory, except where the evidence is so inherently incredible that no reasonable person would accept its truth.’

Some of the essential features which account for the existence of the ‘no case to answer’ procedure at common law are absent in international criminal trials. This concerns in particular the professional character of judges and the lack of jury, as well as the flexible rules on the admission of evidence and the merged guilt-determination and sentencing phases. As noted by Judge Robinson in Milošević, there is consequently ‘far less danger of an unjust conviction at the Tribunal than in criminal proceedings in common law jurisdictions; there is certainly less need to insulate judges of a Trial Chamber from evidence which cannot lawfully sustain a conviction.’ It is legitimate to question whether the specifics of the ICTY, ICTR, and SCCL process make this procedure of common law origin irrelevant or whether its rationales and aspects require re-interpretation. Various Chambers and individual judges in those courts have acknowledged the need to reconsider the domestic practice in the context of the tribunals’ Statutes and RPE and recognized that differences from the national context may arise. The question is also whether ‘no case to answer’ has been correctly contextualized by the tribunals. Among the problematic aspects of ‘translation’ has been the unwieldy character of the procedure and its propensity to generate lengthy submissions by the parties and voluminous decisions of the Chamber, resulting in significant delays. In particular, this was the case at the ICTY prior to the decision of the judges to turn it into an oral procedure so as to approximate it more to the summary process at common law, as discussed below.

Another question is why the tribunals with Chambers composed of professional judges felt bound to adhere to the common law standard of review for the purpose of Rule 98bis proceedings. In Milošević, Judge Robinson raised a similar question and suggested that an appropriate standard of review would need to be different (although not necessarily lower): i.e. the evidence that

On the US law and the development of the evidentiary standard, see further Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 578-9. Doney v. R. [1990] HCA 51; (1990) 171 CLR 207, at 214-5 (‘if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. … [A] verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.’). Kordić and Čerkez Rule 98bis decision (n 361), para. 21. See also Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 578.

Separate opinion of Judge Patrick Robinson, S. Milošević Rule 98bis decision (n 363), paras 11-12 (speaking of ‘a Chamber of professional judges perfectly capable of sifting evidence to determine what items could lawfully sustain a conviction and what items could not.’).

See e.g. Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 579 (the rationale of ‘no case’ in domestic contexts tend ‘to demonstrate why the process verges on the redundant in a court where judges are triers of both fact and law.’).

E.g. Kordić and Čerkez Rule 98bis decision (n 361), para. 9 (critical of the use of the label ‘no case to answer’ in the context of the Rule 98bis procedure); Jelisić appeal judgment (n 363), para. 34 (‘to require strict conformity with a common law formula would not be appropriate; it is the substance which is important’); Strugar Rule 98bis decision (n 360), paras 12-13 (referring to the lack of jury and admissibility of hearsay); S. Milošević Rule 98bis decision (n 363), para. 13(5) (mentioning the admissibility of hearsay) and Separate opinion of Judge Patrick Robinson, ibid., paras 6-9 and 12-4; Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, Prosecutor v. Hadžihasanović and Kubura, Case No. IT-01-47-T, TC II, ICTY, 27 September 2004 (‘Hadžihasanović and Kubura Rule 98bis decision’), para. 14.

E.g. Strugar Rule 98bis decision (n 360), para. 20.

For details, see infra n 396.
would have been discarded at the ‘no case’ stage at common law may be retained in the analogous stage of the tribunal proceedings.\footnote{Separate opinion of Judge Patrick Robinson, S. Milošević Rule 98bis decision (n 363), paras 12-3. Supporting the application of a higher threshold, see S. Zappalà, Human Rights in International Criminal Proceedings (Oxford: Oxford University Press, 2003) 93-4 n46. Zappalà argued that this standard of review ‘seems too much inspired by concepts intrinsically related to systems where verdicts are given by a jury’ and recommended to abandon it ‘as too rigidly grounded on the common law approach’.}

One ICTY Trial Chamber dismissed the idea that the dual function of judges as triers of both fact and law is relevant in the tribunal practice, since the judges in any case ‘must segregate their functions as triers of law and fact, and, in that regard, leave for determination at the end of the case questions of reliability and credibility in the same way as those questions would be left for determination by a jury in domestic systems’.\footnote{Kordić and Ćerkez Rule 98bis decision (n 361), para. 25.} This explanation raises questions. First, it lacks legal basis: nothing in the Statutes or Rules prescribes that judges must reserve the evaluation of evidence for the end of the case. Second, there is a structural issue of unity of adjudication in the tribunals. Where the functions of trier of fact and trier of law are performed by the same bench, a separation between these two functions is theoretical and artificial. The idea that professional judges are capable of strictly separating these two aspects may well be at odds with the empirical realities of adjudication and natural laws of human cognition. It is unsurprising that some ICTY Judges have been bewildered by the need to apply ‘no case’ in a non-jury setting.\footnote{See e.g. in Transcript, Prosecutor v. Brdamin and Talić, Case No. IT-99-36-T, TC II, ICTY, 3 December 2003, at 23118, lines 8-21 (Judge Agius: ‘it’s a system which has been adopted from the common law tradition, where the judge or magistrate who decides that matter is usually not going to be the judge or magistrate who will decide the merits of the case later on, and most of the time the merits being left in the hands of lay jurors. But here we have got this hybrid animal of transporting the common law principle and putting us in the anomalous situation where we have to acknowledge that … the three of us suffer from schizophrenia. We have to convince ourselves that we are not going to be the Judges that will eventually try this case at the end and just put ourselves in … [B]elieve me, it’s the first time I’m doing this in my life, knowing that I’m going to be the judge who will decide the issue later on, together with Judge Janu and Judge Taya, and trying to convince [them] and myself, forget about that, just imagine that’s going to be someone else.’).} Some commentators have similarly questioned the relevance of the whole procedure in the tribunal context and argued that Rule 98bis is partially redundant.\footnote{Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 583 (asking whether ‘a partly redundant rule in international criminal trials’ (Rule 98bis) ‘should be abandoned’).} The issues of law and fact are intertwined, which renders the process of adjudication syncretic to a large extent, especially where the decision-making body competent with regard to both types of matters is the same.\footnote{S. Freeland, ‘Commentary’, in A. Klip and G. Sluiter (eds), Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 2003, Volume XV (Antwerp: Intersentia, 2008) 129 (‘Distinguishing between questions of law and questions act in these circumstances is not as straightforward as it may appear, particularly where the question of law to be considered essentially involves a preliminary determination of the facts that have been presented by the prosecution.’).} The question is not only whether international criminal judges as professional judges are capable of effectively distinguishing between the two functions, but whether it is at all necessary. The prevalent school of thought at the tribunals has readily embraced this approach, but one can trace a more nuanced argument in the individual opinions, which has, however, not been nearly as influential.\footnote{For discussion, see accompanying text to infra nn 440-450.}

Setting these issues aside for now, the incorporation of the practice analogous to ‘no case’ is not without benefits in systems drawing upon the adversarial format of case presentation, as it enhances procedural fairness and efficiency. First, the presumption of innocence demands, \textit{at least}, that the accused be spared from the continued hardship of having to stand a trial when the allegations against him do not appear to be substantiated.
even by potentially sufficient evidence.\textsuperscript{382} The emphasis on ‘at least’ is deliberate, because according to what may appear to be a more ‘progressive’ interpretation of the presumption of innocence, an acquittal following the prosecution case must be entered by the tribunal adjudicating on matters of both law and fact, whenever prosecution evidence leaves a reasonable doubt as to the guilt of the defendant.\textsuperscript{383} Second, the practice is conducive to judicial economy and pragmatism. It is hard to justify any further expenditure of court time and resources in hearing the defence evidence where, based on the prosecution evidence, conviction cannot be entered\textsuperscript{384} The ‘managerial’ value of this device, allowing to trim the prosecution case, has been doubted because this function is now exercised in the pre-trial phase under Rule 73bis.\textsuperscript{385} Indeed, trial management does not appear to be the true rationale of this procedure. As a side note, it might equally be said that the interests of efficiency militate against allowing the trial to run its course if the prosecution case still allows a reasonable doubt as to the guilt. Why then not acquit immediately, without having the defence present evidence, which would only seek to increase that doubt? The Chambers have defined the rationale of the procedure on the motions for the judgment of acquittal as follows: ‘to determine whether the Prosecution has put forward a case sufficient to warrant the Defence being called upon to answer it’.\textsuperscript{386} Its essential function is ‘to bring an end to only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is weak’.\textsuperscript{387} The reasons for allowing a case based on the prosecution evidence that is ‘weak’ proceed to the defence phase and the benefits of this approach are unclear. This explanation does not hinge on the expansive interpretation of the presumption of innocence and the interests of efficiency, as set out above, as it suggests that an acquittal should be entered mid-trial only when there is no evidence on whose basis the Chamber could convict. An assessment of the fundamental rationale of this procedure is best made in the context of the examination of the applicable standard of proof and will be provided below.\textsuperscript{388} Prior to that, the following subsections will outline the evolution of the law and practice on the motions for the judgment of acquittal after the prosecution case.

\textbf{B. Evolution of the law}

In contrast with historical international military tribunals at Nuremberg and Tokyo, the ICC, the SPSC, and the ECCC, the ICTY, ICTR, and SCSL procedure currently incorporates the

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\item \textsuperscript{382} \textit{Strugar} Rule 98\textit{bis} decision (n 360), para. 13; \textit{S. Milošević} Rule 98\textit{bis} decision (n 363), para. 11. Cf. Transcript, \textit{Prosecutor v. Orić}, Case No. IT-03-38-T, TC II, ICTY, 4 May 2005, at 7848 (‘\textit{Orić} Rule 98\textit{bis} transcript’), lines 16-9 (Judge Agius describing the purpose of Rule 98\textit{bis} as ‘a procedure within the trial that would make it possible for the trial to finish earlier if the right circumstances are obtained’ and to honour the right to remain silent); Separate and Concurring Decision of Judge Williams on Imanishimwe’s Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98 \textit{bis}, \textit{Prosecutor v. Ntagurera et al.}, Case No. ICTR-99-46-T, TC III, ICTR, 13 March 2002 (‘Ntagurera \textit{et al.} separate opinion of Judge Williams’), para. 4. The contemplation of this principle has featured prominently in the said procedure from the first ICTY cases, where it served as a major legal justification for considering of the motion to dismiss charges midway the trial. See further Zappalà, \textit{Human Rights in International Criminal Proceedings} (n 376), at 91-2.
\item \textsuperscript{383} \textit{Zappalà, Human Rights in International Criminal Proceedings} (n 376), at 94 n46.
\item \textsuperscript{384} \textit{Orić} Rule 98\textit{bis} transcript (n 382), at 7848; \textit{Ntagurera et al.} separate opinion of Judge Williams (n 382), paras 4 and 8 (‘it would be a waste of precious resources and judicial time to require the Defence … to answer the charge of conspiracy’).
\item \textsuperscript{385} Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 582. On trial management, see Chapter 8.
\item \textsuperscript{386} E.g. \textit{Kordić and Ćerkez} Rule 98\textit{bis} decision (n 361), para. 11.
\item \textsuperscript{387} \textit{Strugar} Rule 98\textit{bis} decision (n 360), para. 20; \textit{Hadžihasanović and Kubura} Rule 98\textit{bis} decision (n 373), para. 20.
\item \textsuperscript{388} See \textit{infra} 3.2.4.C.
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device analogous to ‘no case to answer’, but the initial versions of the Rules of the *ad hoc* tribunals did not contain any provisions to that effect. Some commentators and judges considered this as an intentional departure from the common law trial scheme.\(^{389}\)

However, the ‘adversarial logic’ eventually prevailed in practice and the rule concerning acquittals in the halfway stage of trial was codified in the Rules.\(^{390}\) At the ICTY, defence motions to dismiss the indictment after the close of the prosecution case were filed and dealt with under Rule 54, which confers on the judges a general authority to make such orders as necessary for the conduct of trial. Mid-trial motions for acquittal became regular practice from the outset and were subsequently filed in every trial.\(^{391}\) With view to regulating this procedure, ICTY Rule 98bis was enacted in March 1998, allowing the Trial Chamber, on the motion of the accused or *proprio motu*, to enter the judgment of acquittal on any offences or charges with respect to which it finds that ‘the evidence is insufficient to sustain a conviction’.\(^{392}\)

The Rule has been amended twice since. The 17 November 1999 amendment fine-tuned the Rule by introducing the requirement that an accused may file a motion for the judgment of acquittal within seven days after the close of the prosecution case and, in any event, prior to the presentation of defence evidence pursuant to Rule 85(A)(ii).\(^{393}\) The subsequent 8 December 2004 amendment was more far-reaching and gave the Rule its present shape: ‘At the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.’\(^{394}\) It is worth addressing the implications of this amendment.

First, the test ‘evidence insufficient to sustain conviction’ was rephrased as ‘no evidence capable of supporting a conviction’. It was argued that the purpose was to clarify the standard of proof, rather than adjust or lower it.\(^{395}\) Second, by analogy with a summary procedure at common law, the amendment effectively rendered the Rule 98bis procedure oral, which concerns both submissions by the parties and the decision thereon. This was meant to ensure consistency with the initial rationale of expediting trials. The previous practice of written briefs and lengthy rulings under Rule 98bis had proven to cause delays of about three months.\(^{396}\) Such delays were unsurprising, given that the length of some of the

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390 O’Dowd, ‘Commentary’ (n 389), at 133.


392 Rule 98bis ICTY RPE (IT/32/Rev. 13, 9-10 July 1998) was approved at the 17th plenary session (11-13 March 1998) upon the recommendation of the Rules Committee presided by Judge Shahabuddeen and created ‘to investigate the objective of conducting trials more expeditiously without jeopardizing respect for the rights of accused persons’: Fifth Annual Report of the ICTY (n 67), paras 106-7.

393 Rule 98bis ICTY RPE (IT/32/Rev. 17).

394 Rule 98bis ICTY RPE (IT/32/Rev. 33, 8 December 2004), amended at the 31st plenary session. See Twelfth Annual Report of the ICTY, UN Doc. A/60/267-S/2005/532, 17 August 2005, para. 29 (stressing the importance of the amendment). The amendments may have been inspired by the ideas expressed in Separate opinion of Judge Patrick Robinson, *S. Milošević* Rule 98bis decision (n 363).

395 See text to infra notes 412-414.

396 Before the December 2004 amendment, some Judges and Chambers noted with concern the ‘prevailing tendency for Rule 98 bis motions to involve much delay, lengthy submissions, and therefore an extensive
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Rule 98bis decisions ran up to over one hundred pages. From December 2004 onwards, the submissions by parties were to be delivered in an oral form. An oral decision was to be handed on a short notice, followed by written reasons at a later stage, as it has been done in some of the previous cases before the ICTY. This solution was subsequently held to be more efficient. Third, the Chamber became duty-bound to undertake the Rule 98bis analysis regardless of whether the defence filed the motion, whilst before this had been a party-driven procedure with a possibility of pro proprio motu action. Consequently, the seven-day requirement for filing the motion was removed. Fourth, the word ‘offences’ was replaced for the word ‘count’, to avoid the reading of the rule as requiring evidence capable of supporting conviction for each event fitting to the legal qualification of the offence.

ICTR Rule 98bis was adopted at the V plenary session in June 1998 and was similar to the respective ICTY Rule. The difference was that the pre-December 2004 text of ICTY Rule 98bis referred to ‘offences charged’, whilst the ICTR Rule read ‘counts’.

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analysis of evidentiary issues in decisions’: e.g. Separate Opinion of Judge Patrick Robinson, Milošević Rule 98bis decision (n 363), para. 16; Hadžihasanović and Kubura Rule 98bis decision (n 373), para. 20; Strugar Rule 98bis decision (n 360), para. 20. See also Orić Rule 98bis transcript (n 382), at 7849, lines 3-16 (‘as more cases were put on trial … it was realised that Rule 98, instead of serving the purpose for which it was intended in the first place, was serving very little in regards of the substance of the indictment itself. Much time and much efforts were being lost in not only elaborating voluminous, lengthy motions, lengthy responses, and lengthy decisions, but also … in studying and evaluating single incidents and particular events on which various witnesses would have given testimony, evidence, mistaking what the substance of a Rule 98 bis motion really should be. The result was that from the moment the Prosecution rested its case to the time when the Trial Chamber would come to its decision, most of the time we would have a lapse of time of something like three months’).


In Krajišnik, the defence complaint that the amended Rule 98bis no longer allowed a comprehensive review of all matters in the indictment was rejected by the Chamber as unfounded in an oral decision: Transcript, Prosecutor v. Krajišnik, Case No. IT-00-39-T, TC I, ICTY, 19 August 2005, at 17113-4.

See e.g. Decision on Motion for Acquittal Pursuant to Rule 98 bis, Prosecutor v. Brdanin, Case No. IT-99-36-T, TC, ICTY, 28 November 2003 (‘Brdanin Rule 98bis decision’), para. 1 (the oral decision issued on 9 October 2003).

While a defence motion under Rule 98bis normally resulted in a three-month delay, the application of the amended Rule in the Orić trial allowed shortening that period to one week. See Twelfth Annual Report of the ICTY (n 394), para. 7 and Transcript, Prosecutor v. Orić, Case No. IT-03-38-T, TC II, ICTY, 8 June 2005, at 9035-6 (Judge Agius considering the amendment as an ‘a successful experiment’ allowing to conclude in less than one week what earlier had taken about two months). Another possible avenue was to abolish the rule altogether, but it was rejected in order to give effect to the presumption of innocence and the right to silence: Orić Rule 98bis transcript (n 382), at 7850.

Orić Rule 98bis transcript (n 382), at 7849. Such a pro proprio motu power was exercised in Simić: see Written Reasons for Decision on Motions for Acquittal, Prosecutor v. Simić et al., Case No. IT-95-9-T, TC II, ICTY, 11 October 2002 (‘Simić et al. Rule 98bis decision’), paras 25-28.

It was often impracticable and had to be extended, sometimes for lengthy periods: Orić Rule 98bis transcript (n 382), at 7851; Decision on Motion of the Accused Vlatko Kupreskić to the Trial Chamber to Order the Entry of Judgement of Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence, Prosecutor v. Kupreškić et al., Case IT-95-16-T, TC II, ICTY, 8 January 1999.

Orić Rule 98 bis transcript (n 382), at 7857-8.

The Rule was enacted along with other amendments aimed at expediting the ICTR proceedings: Third Annual Report of the ICTR (n 157), para. 15.

Rule 98bis ICTR RPE (8 June 1998) (‘If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused or proprio motu, shall order the entry of judgement of acquittal in respect of those counts.’). Cf. Rule 98bis ICTY RPE (IT/32/Rev.13).
seven-day requirement incorporated in the ICTY Rule on 17 November 1999 was adopted
by the ICTR judges only at the XII plenary session on 6 July 2002, the reason for which may
be that at the ICTR the Rule was not invoked until 2001. Unchanged since, the current
version of ICTR Rule 98bis authorizes the Chamber, acting proprio motu or when moved by
the defence within seven days after the close of the prosecution case unless ordered
otherwise, to enter a judgment of acquittal on the counts with respect to which ‘evidence is
insufficient to sustain a conviction’. The ICTR judges chose not to go along with their ICTY
colleagues in amending the Rule 98bis procedure. The ICTR Rule still reflects the procedure
in a written form, the limited time for filing the defence motion (abolished at the ICTY), and
the original formulation of the evidentiary threshold test. Apparently, the Rule 98bis practice
was not seen as a problem to the same extent as at the ICTY so as to call for further
reforms. Indeed, most ICTR decisions are not as lengthy and detailed in part of
substantive findings.

In contrast with the ICTR, the analogous SCSL Rule 98 underwent substantial
amendment process. Initially formulated in the way identical to ICTR Rule 98bis at the time,
was first amended in 2003, to stipulate that the Trial Chamber, after the close of the
prosecution case, shall enter a judgment of acquittal on the counts on which ‘the evidence is
such that no reasonable Tribunal of fact could be satisfied beyond a reasonable doubt of the
accused’s guilt’. In 2005, the ‘reasonable Tribunal of fact’ test was replaced with
‘evidence capable of supporting a conviction’. In line with the evolution of the ICTY Rule
aimed at expediting the proceedings, the May 2006 version of the SCSL Rule 98 provided
for the oral rendering of decisions on the motion for the judgment of acquittal, after hearing
oral submissions of the parties.

C. Standard of review

The standard of proof that the prosecution case must meet at its close for the judges to refuse
to enter a judgment of acquittal was a contentious and widely litigated issue. ICTY Rule
98bis and SCSL Rule 98 speak of ‘no evidence capable of supporting a conviction’, whereas, as noted, ICTR Rule 98bis retains the original formula (‘the evidence is
insufficient to sustain a conviction’). It appears that the different wording was not intended
to attract and has not attracted material differences in the interpretation of the standard.

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406 See Rule 98bis ICTR RPE (6 July 2002). The first ICTR decision under Rule 98bis was Decision on the
Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts
Contained in the Third Amended Indictment,..., Prosecutor v. Semanza, Case No. ICTR-97-20-T, TC III,
407 In a similar vein, see Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 582.
408 But see Klip, ‘Commentary’ (n 397), at 608 (advising that the ICTR introduce amendments similar to the
ICTY).
409 Amended at the 2nd Plenary Meeting of judges held on 2-7 March 2003, to read as follows: ‘If after the
close of the case for the Prosecution, the evidence is such that no reasonable Tribunal of fact could be satisfied
beyond a reasonable doubt of the accused’s guilt on one or more counts of the indictment, the Trial Chamber
shall enter a judgment of acquittal on those counts.’ See Decision on Motions for Judgment of Acquittal
Pursuant to Rule 98, Prosecutor v. Norman et al., Case No. SCSL-04-14, TC I, SCSL, 21 October 2005
(‘Norman et al. Rule 98 decision’), para. 30.
410 Amended at the 6th Plenary Meeting of the Judges held on 14-15 May 2005, to read as follows: ‘If after the
close of the case for the Prosecution, there is no evidence capable of supporting a conviction on one or more of
the counts of the indictment, the Trial Chamber shall enter a Judgment of acquittal on those counts.’ Norman et
al. Rule 98 decision (n 409), paras 31-33.
411 Amended at the 7th Plenary Meeting of the judges held on 12-13 May 2006, see Fourth Annual Report of
the President of the SCSL (January 2006 – May 2007), at 10 and 24, referring to this as one of the most
significant amendments of that plenary.
412 Orić Rule 98 bis transcript (n 382), at 7856-7 (Judge Agius: “Bringing forward evidence which is
insufficient to sustain a conviction” is tantamount to not having brought evidence capable of supporting a
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However, commentators suggested, based on literal interpretations, that the amendment had rendered the standard less exacting for the prosecution, insofar it was expected to present at least some evidence which could lead to conviction, while earlier that evidence had to be no less than sufficient to convict.\(^{413}\) If that interpretation had been correct, the ostensibly reduced burden of proof under Rule 98bis would be nearly as low as that applied to the confirmation of indictments (‘prima facie case’) or, paradoxically, even lower.\(^{414}\) But having the prosecutor satisfy the same standard for the second time at the more advanced stage of the proceedings would have deprived the Rule 98bis procedure of its point.

The Rule 98bis standard refers specifically to ‘conviction’. Therefore, the party arguments and decisions have understandably revolved around the difference between this standard and that of ‘beyond reasonable doubt’ required to convict, rather than ‘prima facie case’. The defence was of course inclined to see the procedure as a shortcut to acquittal and expected the court to assess credibility and probative value of prosecution evidence already at the halfway stage and to have compromised or unreliable evidence stricken out. Doing so would require applying the higher standard of proof, the one equal to ‘beyond reasonable doubt’. Yet, the prosecution has countered this with an argument that a distinction must necessarily be maintained between the Rule 98bis and the Rule 98 standard of review to be applied by the Trial Chamber in its Rule 98bis exercise which therefore remains that set out and repeatedly applied by these Trial Chambers’. The SCSL repeatedly asserted the equivalence of the two standards: Norman et al. Rule 98 decision (n 409), para. 47; Brima et al. Rule 98 decision (n 397), paras 8-9 (noting that ‘there is no contextual difference and that the ‘plainer language of the amended form of the Rule’ was intended to ‘leav[ing] no doubt that what must be considered … is not the reliability or credibility of the evidence’).\(^{415}\) K.N. Calvo-Goller, The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents (Leiden/Boston: Martinus Nijhoff, 2006) 288 (noting that ‘no evidence capable of supporting a conviction’ standard is more stringent for the accused than ‘insufficient evidence to sustain a conviction’); Freeland, ‘Commentary’ (n 380), at 131. Notably, some ICTY Judges have interpreted ‘prima facie case’ as ‘sufficient evidence to provide reasonable grounds for believing’). Comparing the Rule 98bis standard with the ‘prime facie case’, see Freeland, ‘Commentary’ (n 380), at 131. Notably, some ICTY Judges have interpreted ‘prima facie case’ in terms similar to the Rule 98bis test: e.g. Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, Prosecutor v. S. Milošević et al., Case No. IT-99-37-I, Judge Hunt, ICTY, 29 June 2001, para. 3 (‘whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question’); Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, Prosecutor v. Mladić, Case No. IT-95-5/18-I, Judge Orie, ICTY, 8 November 2002, para. 26 (‘the Prosecution evidence, if accepted and uncontradicted, sufficiently supports the likelihood of the accused’s being convicted by a reasonable trier of fact’); see also Decision of Trial Chamber I on the Defence Motion to Dismiss, Prosecutor v. Blaškić, Case IT-95-14-T, TC I, ICTY, 3 September 1998 (‘Blaškić decision on the motion to dismiss’) and Semanza Rule 98bis decision (n 406), paras 15-6 (labelling the Rule 98bis standard as ‘prima facie case’). At common law the two standards are indeed equivalent, but it is not necessarily the case at the tribunals, whose RPE define ‘prima facie case’ as ‘reasonable grounds to believe’. This ‘balance of probabilities’ threshold is lower than ‘evidence capable of supporting a conviction’, and thus ‘prima facie case’ is a misnomer from a common law perspective. Arguing that Rule 47(B) is inconsistent with a correct interpretation of ‘prima facie case’, see D. Hunt, ‘The Meaning of a “Prima Facie Case” for the Purposes of Confirmation’, in R. May et al. (eds.), Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald (The Hague: Kluwer, 2001) 137-51. See contra Nagerura et al. separate opinion of Judge Williams (n 382), para. 6 (at the confirmation of indictment and preliminary challenge stages, ‘the Prosecutor is held to a lower standard of proof’).

\(^{415}\) Recapitulating typical arguments, see Judgement on Defence Motions to Acquit, Prosecutor v. Sikirica et al., Case No. IT-95-8-T, TC, ICTY, 3 September 2001 (‘Sikirica et al. Rule 98bis judgement’), paras 3-6.
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From early on, the tribunals acknowledged the distinction between the halfway determinations and the ultimate decision on the guilt or innocence, by acknowledging that the denial of a Rule 98bis motion on a certain count does not indicate the Chamber’s view on the guilt of the accused on that count.\footnote{Strugar Rule 98bis decision (n 360), para. 18 (‘in no sense, an indication of the view of the Chamber as to the guilt of the accused on that charge’); Kordić and Ćerkez Rule 98bis decision (n 361), para. 11.} The Chambers have consistently applied the standard of review aligned with the common law test of ‘no case to answer’ and less demanding than ‘beyond reasonable doubt’.\footnote{For an overview, see Kordić and Ćerkez Rule 98bis decision (n 361), paras 11-16 and 18 (stating at para. 11 that the standard under Rule 98bis is lower than ‘beyond reasonable doubt’). Cf. Kunarac et al. Rule 98bis decision (n 391), paras 9-10 (the prosecution submission to that effect misconstrues Kordić: while the standard of ‘could convict’ requires ‘less persuasion’ on the part of the prosecutor, it is not lower but merely different). Likewise, Separate Opinion of Judge Patrick Robinson, S. Milošević Rule 98bis decision (n 363), para. 13.} Before the enactment of ICTY Rule 98bis, the standard was ‘whether as a matter of law there is evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused’,\footnote{Tadić decision on defence motion to dismiss charges (n 391), at 2.} or whether there is evidence ‘which, were it to be accepted, is such that a reasonable Tribunal might convict’.\footnote{Delalić et al. decision on the motions to dismiss the indictment (n 391), at 4.} These interpretations were uniformly endorsed in trial decisions subsequent to the adoption of Rule 98bis for the purpose of interpreting that Rule.\footnote{Blaškić decision on the motion to dismiss (n 414) (‘the required standard is that the evidence presented by the Prosecution be insufficient to justify from this time forth a conviction for all or part of the counts concerned’ or if ‘the Prosecution has so clearly failed to satisfy its obligation as to the prosecuting party, that, commencing with that stage of proceedings, it is no longer even necessary to review the Defence evidence’); Decision on Motion for Withdrawal of the Indictment Against the Accused Vlatko Kupreškić, Prosecutor v. Kupreškić et al., Case IT-95-16-T, TC II, ICTY, 18 December 1998; Kordić and Ćerkez Rule 98bis decision (n 361), para. 26; Kunarac et al. Rule 98bis decision (n 391), para. 3.} The only ICTY decision in which a Trial Chamber acquitted on the count of genocide at the close of the prosecution case, as a result of not being satisfied ‘beyond reasonable doubt’, was in Jelisić.\footnote{Judgement, Prosecutor v. Jelisić, Case No. IT-95-10-T, TC I, ICTY, 14 December 1999, paras 16 and 138; see further, in the same case, Transcript, 19 October 1999, at 2337, lines 13-23.} However, other Chambers did not follow this approach and it was subsequently reversed on appeal.\footnote{Jelisić appeal judgment (n 363), paras 30-40 (the reversal did not affect the sentence, as the Chamber neither rendered a new sentence nor remitted the case for retrial); Kordić and Ćerkez Rule 98bis decision (n 361), para. 17 (deliberately choosing to misapply the ‘beyond reasonable doubt’ standard pending Jelisić appeal judgment, as it was ‘arrived at in the unusual circumstances of that case’); Kunarac et al. Rule 98bis decision (n 391), para. 3.} The appeal judgment was attended by individual opinions by Judge Pocar and Judge Shahabuddeen, respectively dissenting and concurring on this matter. Their reasoning deserves to be paused upon in due course.

The Jelisić Appeals Chamber’s majority affirmed the ‘reasonable tribunal’ test and elaborated further on the evidentiary threshold. It relied on its previous decision in Delalić et al., in which it set out the test of Rule 98bis as ‘whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question’.\footnote{Delalić et al. appeal judgment (n 86), para. 434 (also stating that the test ‘whether the evidence is factually sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact could have reached’). Further references to appeal judgments in Aleksovski (viz. para. 63) and Tadić (para. 64) make clear that the AC equates the standard of review for the purposes of Rule 98bis with the one used to assess whether a factual finding reached by the TC may be disturbed by the AC, i.e. whether no reasonable tribunal of fact could have reached the same conclusion.} The Jelisić majority refined that test and provided what has subsequently been treated by Trial Chambers as the conclusive treatment of the issue:

\[\text{\footnotesize 416 Strugar Rule 98bis decision (n 360), para. 18 (‘in no sense, an indication of the view of the Chamber as to the guilt of the accused on that charge’); Kordić and Ćerkez Rule 98bis decision (n 361), para. 11.}\]
\[\text{\footnotesize 417 For an overview, see Kordić and Ćerkez Rule 98bis decision (n 361), paras 11-16 and 18 (stating at para. 11 that the standard under Rule 98bis is lower than ‘beyond reasonable doubt’). Cf. Kunarac et al. Rule 98bis decision (n 391), paras 9-10 (the prosecution submission to that effect misconstrues Kordić: while the standard of ‘could convict’ requires ‘less persuasion’ on the part of the prosecutor, it is not lower but merely different). Likewise, Separate Opinion of Judge Patrick Robinson, S. Milošević Rule 98bis decision (n 363), para. 13.}\]
\[\text{\footnotesize 418 Tadić decision on defence motion to dismiss charges (n 391), at 2.}\]
\[\text{\footnotesize 419 Delalić et al. decision on the motions to dismiss the indictment (n 391), at 4.}\]
\[\text{\footnotesize 420 Blaškić decision on the motion to dismiss (n 414) (‘the required standard is that the evidence presented by the Prosecution be insufficient to justify from this time forth a conviction for all or part of the counts concerned’ or if ‘the Prosecution has so clearly failed to satisfy its obligation as to the prosecuting party, that, commencing with that stage of proceedings, it is no longer even necessary to review the Defence evidence’);}\]
\[\text{\footnotesize 421Decision on Motion for Withdrawal of the Indictment Against the Accused Vlatko Kupreškić, Prosecutor v. Kupreškić et al., Case IT-95-16-T, TC II, ICTY, 18 December 1998; Kordić and Ćerkez Rule 98bis decision (n 361), para. 26; Kunarac et al. Rule 98bis decision (n 391), para. 3.}\]
\[\text{\footnotesize 422 Jelisić appeal judgment (n 363), paras 30-40 (the reversal did not affect the sentence, as the Chamber neither rendered a new sentence nor remitted the case for retrial); Kordić and Ćerkez Rule 98bis decision (n 361), para. 17 (deliberately choosing to misapply the ‘beyond reasonable doubt’ standard pending Jelisić appeal judgment, as it was ‘arrived at in the unusual circumstances of that case’); Kunarac et al. Rule 98bis decision (n 391), para. 3.}\]
\[\text{\footnotesize 423 Delalić et al. appeal judgment (n 86), para. 434 (also stating that the test ‘whether the evidence is factually sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact could have reached’). Further references to appeal judgments in Aleksovski (viz. para. 63) and Tadić (para. 64) make clear that the AC equates the standard of review for the purposes of Rule 98bis with the one used to assess whether a factual finding reached by the TC may be disturbed by the AC, i.e. whether no reasonable tribunal of fact could have reached the same conclusion.}\]
Chapter 10: Presentation and Examination of Evidence

The test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.424

This language became mainstream in the subsequent jurisprudence. The post-Jelisić test under Rule 98bis of the ad hoc tribunals and SCSL Rule 98, as generally applied, required the prosecution to show that ‘there is evidence upon which a reasonable tribunal of fact could convict, not that the Trial Chamber itself should convict.’425 Some Chambers have explained the test by rephrasing it as follows: ‘the issue is not whether the Trial Chamber would be persuaded beyond reasonable doubt to convict after fully evaluating the evidence then before it, but rather, and quite differently, whether it would be properly open to a trial Chamber, taking the evidence at its highest for the Prosecution, to be persuaded beyond reasonable doubt to convict the accused.’426

Before discussing the adequacy of this test and how it bears upon the rationales for the Rule 98bis procedure, it is apt to assess its implications, as interpreted by the ICTY, ICTR and SCSL Trial Chambers. First, as noted previously, a decision on the motion for acquittal does not involve evaluation of or pronouncement on the guilt of accused.427 A ruling to the effect that there is evidence capable of supporting a conviction on a particular charge does not mean that the Trial Chamber has taken a view on the guilt and will, at the end of the case, return a conviction on that charge.428 Irrespective of whether the defence presents any evidence, the Chamber may still acquit at the end of the trial if after having the

424 Jelisić appeal judgment (n 363), para. 37.
425 See e.g. Kunarac et al. Rule 98bis decision (n 391), para. 3; Kordić and Čerkez Rule 98bis decision (n 361), para. 26; Strugar Rule 98bis decision (n 360), para. 11; Decision on the Motion for the Entry of Acquittal of the Accused Stanišlav Galić, Prosecutor v. Galić, Case No. IT-98-29-T, TC I Section B, ICTY, 3 October 2002, para. 10; Decision on Motions for Acquittal, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34-T, TC I Section A, ICTY, 28 February 2002, para. 10; Simić et al. Rule 98bis decision (n 401), para. 8; Brdanin Rule 98bis decision (n 399), para. 4; Milošević Rule 98bis decision (n 363), paras 9 and 13(6); Semanza Rule 98bis decision (n 406), para. 15; Decision on Defence Motion for Acquittal under Rule 98 bis, Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-97-21-T et al., TC II, ICTR, 16 December 2004 (‘Nyiramasuhuko et al. Rule 98bis decision’), para. 70; Decision on Defence Motions for Judgement of Acquittal, Prosecutor v. Ndindillyimana et al., Case No. ICTR-00-56-T, TC II, ICTR, 20 March 2007 (‘Ndindillyimana et al. Rule 98bis decision’), para. 6; Decision on Defence Motion for Judgement of Acquittal pursuant to Rule 98 bis, Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, TC II, ICTR, 22 May 2007 (Rukundo Rule 98bis decision), para. 3; Decision on Motions for Judgement of Acquittal, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, TC III, ICTR, 19 March 2008 (‘Karemera et al. I Rule 98bis decision’), para. 4; Norman et al. Rule 98 decision (n 409), para. 35; Transcript, Prosecutor v. Brima et al., Case No. SCSL-2004-16-T, TC II, SCSL, 31 March 2006 (‘Brima et al. Rule 98 oral decision’), at 5, lines 11-20 (according to the Jelisić standard), 24-27 (‘whether there is evidence, if believed, upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question’); Brima et al. Rule 98 decision (n 412), para. 15; Transcript, Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, TC I, SCSL, 25 October 2006 (‘Sesay et al. oral Rule 98 decision’), at 6.
426 Strugar Rule 98bis decision (n 360), paras 16 and 18; Hadžihasanović and Kubura Rule 98bis decision (n 373), para. 15.
427 Kordić and Čerkez Rule 98bis decision (n 361), para. 11; Strugar Rule 98bis decision (n 360), para. 10; Norman et al. Rule 98 decision (n 409), paras 34 and 39.
428 Strugar Rule 98bis decision (n 360), para. 18; Hadžihasanović and Kubura Rule 98bis decision (n 373), para. 17; S. Milošević Rule 98bis decision (n 363), para. 13(6); Nyiramasuhuko et al. Rule 98bis decision (n 425), para. 71 (‘it does not follow that non-acquittal under a Rule 98bis motion will necessarily ultimately result in a conviction on the count or the charge at the end of the trial. Even if the Defence fails to adduce exculpatory evidence, the assessment of the evidence in its totality at the end of the trial is different from the evaluation of its sufficiency under Rule 98bis.’); Ndindillyimana et al. Rule 98bis decision (n 425), para. 6; Karemera et al. I Rule 98bis decision (n 425), para. 6; Brima et al. Rule 98 oral decision (n 425), at 5, lines 19-23; Transcript, Prosecutor v. Taylor, Case No. SCSL-2003-01-T, TC II, SCSL, 4 May 2009, at 24211.
evaluated the evidence in the case it concludes that the available incriminating proof does not satisfy it ‘beyond reasonable doubt’ of the guilt of the accused.

Second, a decision under ICTY and ICTR Rule 98bis and SCSL Rule 98 does not involve the evaluation of the credibility of witnesses and quality of the evidence. Prosecution evidence must be assessed as a whole and the Chamber should not be drawn into the micro-assessment of its probative value. This is why the preliminary finding made at the Rule 98bis stage that evidence is not incredible or unreliable on its face not preclude the Chamber from reaching an opposite conclusion at the end of the trial. The assessments of reliability and credibility of specific items of evidence will in most cases be deferred until later, when those can be evaluated in light of other evidence in the case. The need for the contextual evaluation of every piece of evidence often cannot be satisfied after the prosecution concludes its case-in-chief, not least because the defence evidence may yet be presented. Even where the judges are aware of some evidence in favour of the defendant, it should not have consequences for the limited purpose of the Rule 98bis assessment which focuses exclusively on the prosecution evidence. A distinction between the Rule 98bis procedure and the determination of guilt is that it is only for the latter purpose that judges will evaluate credibility and probative value of evidence. The Rule 98bis inquiry seeks to establish whether the evidence is in abstract sense and legally, rather than factually, sufficient to convict or capable of sustaining conviction. The question is whether the prosecution case stands on its own and, when taken at its highest, is not so deficient or underwhelming in material respects as to collapse by itself or under the defence challenges.

The third point is that the entry of a judgment of acquittal after the close of prosecution case is warranted in two scenarios. First of all, there is a blatant lack of any evidence in support of an essential element of the crime alleged. The second scenario,

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429 Kunarac et al. Rule 98bis decision (n 391), para. 4; Strugar Rule 98bis decision (n 360), para. 10; Hadžihasanović and Kubura Rule 98bis decision (n 373), para. 12; Norman et al. Rule 98 decision (n 409), paras 37-38 (‘we should not, at this stage, delve into examining factors that are considered as the real basis for justifying a finding of “proof beyond reasonable doubt” such as an exhaustive analysis or examination of the quality and reliability of the evidence so far available in the records and even the credibility of the witnesses’, although the decision on the motion ‘is necessarily based on our preliminary appreciation of the evidence’).

430 Decision on Motions for Judgement of Acquittal, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, TC I, ICTR, 2 February 2005 (‘Bagosora et al. Rule 98bis decision’), para. 9; Ntagerura et al. separate opinion of Judge Williams (n 382), para. 5.

431 Bagosora et al. Rule 98bis decision (n 430), para. 6.

432 Kunarac et al. Rule 98bis decision (n 391), para. 4 (‘it is a fundamental rule in relation to determining issues of fact that no conclusion should ever be reached in relation to the credit of a witness until all the evidence has been given. A tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. Conversely, apparently credible evidence of another witness may lose that appearance in the light of evidence given by other witnesses’); Judgement on Motions for Acquittal Pursuant to Rule 98 bis, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, TC I Section A, ICTY, 5 April 2004 (‘Blagojević and Jokić Rule 98bis judgment’), para. 15; Milošević Rule 98bis decision (n 363), para. 13(4) (‘The determination whether there is evidence on which a tribunal could convict should be made on the basis the evidence as a whole.’); Nyiramashuhuko et al. Rule 98bis decision (n 425), para. 71(a); Muvunyi Rule 98bis decision (n 430), para. 36; Norman et al. Rule 98 decision (n 409), para. 38.

433 Brcadin Rule 98 bis decision (n 425), para. 62; Hadžihasanović and Kubura Rule 98bis decision (n 373), para. 18 (‘It is at the conclusion of the proceedings, and not at this mid-point, that the Chamber will determine the extent to which any evidence is favourable to Respondent and make a ruling on the overall effect of such evidence in light of the other evidence in the case.’)

434 Sikirica et al. Rule 98bis judgement (n 415), para. 9 (‘if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction, and the motion filed under Rule 98 bis would succeed’); Simić et al. Rule 98bis decision (n 401), para. 7; S. Milošević Rule 98bis decision (n 363), para. 13(1); Nyiramashuhuko et
viewed by the Chambers as exceptional, concerns situations in which no credence can be given to the prosecution evidence, as exemplified by the following: (i) "the only relevant evidence when viewed as a whole is so incapable of belief that it could not properly support a conviction, even when taken at its highest for the Prosecution", (ii) it is ‘so manifestly unreliable or incredible that no reasonable tribunal of fact could credit it’, or (iii) the prosecution case ‘completely broke down either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case’. The prosecution enjoys the benefit of doubt. It is to be assumed that some amount of prosecution evidence would be capable or sufficient to sustain a conviction, whereas the credibility and reliability of its evidence is to be taken at its highest for the purpose of the assessment. This is in contrast with the ultimate determination of guilt or innocence when the presumption of innocence requires the evaluation of facts and evidence in light of the in dubio pro reo principle. Notably, implied in the second scenario above is the recognition that, to some extent, the Chambers do, as a matter of fact, evaluate credibility and reliability of evidence at the 'no case' stage and may in principle acquit based on such evaluation, even though it should not be an in-depth inquiry. Although an assessment of the credibility of evidence will only rarely result in an early acquittal, the evaluation of evidence in fact does occur throughout trial. Given the blurred line between the adjudication on facts and on law in the tribunals, the functions of hearing and evaluating evidence cannot be separated completely and are exercised contemporaneously.

This brings us back to the question posed earlier: does the vesting of authority to decide on the verdict in professional judges, rather than the jury, entitle the Chamber to apply a standard of proof under Rule 98bis that is higher than at common law (evidence on the basis of which 'the reasonable tribunal of fact could convict')? The situation in which the Chamber finds that a (hypothetical) reasonable tribunal of fact could convict on the basis of the evidence presented by prosecution but itself it would not be in a position to convict, is the case in point. Indeed, why is the court to stop at the ‘could convict’ determination and

al. Rule 98bis decision (n 425), para. 71(a); Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, TC I, ICTR, 25 September 2002 (‘Nahimana et al. Rule 98bis decision’), para. 19; Bagosora et al. Rule 98bis decision (n 430), para. 6; Muvunyi Rule 98bis decision (n 432), para. 38; Brima et al. Rule 98 decision (n 412), para. 11.
435 Hadžihasanović and Kubura Rule 98bis decision (n 373), para. 17; Kunarac et al. Rule 98bis decision (n 391), para. 6; Strugar Rule 98bis decision (n 360), para. 18.
436 Jelisić appeal judgment (n 363), para. 55; Strugar Rule 98bis decision (n 360), para. 18; Hadžihasanović and Kubura Rule 98bis decision (n 373), paras 16-17; S. Milošević Rule 98bis decision (n 363), para. 13(2) (referring to the common law exception to the general principle of the non-evaluation of evidence at the ‘no case’ stage); Nyiramashухуko et al. Rule 98bis decision (n 425), para. 71(b) and (c); Muvunyi Rule 98bis decision (n 432), para. 37.
437 Blagojević and Jokić Rule 98bis judgement (n 432), para. 15; Galić Rule 98bis decision (n 425), para. 11; Bagosora et al. Rule 98bis decision (n 430), para. 11 (‘[t]he evidence shall be assumed to be reliable and credible unless convincing arguments have been raised that it is obviously unbelievable, such that no reasonable trier of fact could rely upon it.’).
438 Kordić and Čerkez Rule 98bis decision (n 361), para. 28 and Decision on Defence Motions for Acquittal Prosecutor v. Kvočka et al., Case No. IT-98-30-1-T, TC I, ICTY, 15 December 2000 (‘Kvočka et al. 98 bis decision’), para. 17; Galić Rule 98bis decision (n 425), para. 11; Ndindilimana et al. Rule 98bis decision (n 425), para. 7; Muvunyi Rule 98bis decision (n 432), para. 37; Karemera et al. I Rule 98bis decision (n 425), para. 9.
439 The prosecution evidence is ‘entitled to credence unless incapable of belief’: Jelisić appeal judgment (n 363), para. 55; Nahimana et al. Rule 98bis decision (n 434), para. 18; Muvunyi Rule 98bis decision (n 432), para. 43; Bagosora et al. Rule 98bis decision (n 430), paras 6 and 10 (‘To be incapable of belief, the evidence must be obviously incredible or unreliable; the Chamber should not be drawn into fine assessments of credibility or reliability’); Rukundo Rule 98bis decision (n 425), para. 3; Brima et al. Rule 98 decision (n 412), para. 11. On Rule 98bis as requiring ‘one form of assessment of the facts (evidence) presented, which is to proceed on the assumption that those facts are to be believed’: Freeland, ‘Commentary’ (n 380), at 133.
not acquit directly under the higher standard if at the close of the prosecution case the incriminating evidence appears to the Chamber to fall short of the ‘beyond reasonable doubt’ standard? If it is the tribunal of fact that will be deciding the case on the merits, why should it allow the case to go forward where another reasonable tribunal perhaps, but not itself, could be convinced beyond reasonable doubt by the prosecution evidence? The defects of that evidence are less likely to be repaired during the defence case given that the defence invariably purports to undermine and challenge the prosecution case by rebutting the incriminating evidence and presenting witnesses supporting innocence. Indeed, there are considerations of both fundamental and more practical nature (due process and judicial economy) to favour the application of the in dubio pro reo principle already at the Rule 98bis stage. It is useful to consider the above-mentioned individual opinions in Jelisić which deal with these questions and reckon the situation of international judges in the context of ‘halfway determinations’.

In Jelisić, Judge Shahabuddeen’s opined that the Appeals Chamber overlooked that the jurisprudence it relied upon in defining the standard under Rule 98bis ‘developed largely, though not wholly, in jury systems, whereas Judges of the Tribunal decide both fact and law’. He therefore considered it helpful to inquire into the authoritative practice directions for magistrates in summary proceedings at common law, whose modus operandi is equivalent to that of international criminal judges since they sit without juror and are triers of both fact and law. Whilst affirming the general rule against assessing the credibility of evidence and making definitive findings on guilt or innocence at the ‘no case’ stage, Judge Shahabuddeen cited with approval those authorities supporting that the magistrates’ situation may warrant an exception in certain ‘borderline’ cases, in addition to cases where the evidence is plainly insufficient. The terms of the practice note the judge considered does not contain an absolute prohibition on mid-trial acquittals where ‘the prosecution evidence disclosed evidence which, if accepted, would entitle a reasonable tribunal to convict’, nor do they require magistrates to take the prosecution evidence ‘at its highest’.

In this light, Judge Shahabuddeen opined that ‘at the close of the case for prosecution, a Trial Chamber has a right, in borderline cases, to make a definitive judgement that guilt has not been established by the evidence, even accepting that a reasonable tribunal could convict on the evidence (if accepted)’. This did not lead the judge to dissent on this matter because he regarded the case before the Jelisić Trial Chamber to be neither a clear case of insufficiency of evidence nor a borderline case such as to justify a mid-trial acquittal while accepting that other ‘reasonable tribunal’ could convict. Nor did the impugned judgement indicate that the Trial Chamber itself treated the case as such, according to him. Secondly, while seeing merit in the arguments against unreservedly prohibiting the mid-trial evaluation of evidence, Judge Shahabuddeen recognized it insufficiently strong to be followed, due to possible prejudicial effects for the accused. Importantly, he noted that, except for cases of blatant insufficiency of evidence resulting in an immediate decision favourable to the accused,

the danger of deciding a no case issue by attempting to adjudicate on guilt at the mid-trial stage is that, if the no case decision went against the accused, he would understandably feel that the Trial Chamber has made a definitive finding of guilt, so that, in his mind, subsequent defence evidence and submissions would be addressed to a court which had

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440 Partial Dissenting Opinion of Judge Shahabuddeen, Jelisić appeal judgment (n 363), para. 3.
441 Ibid., paras 4-10; particularly, see para. 9, citing P. Murphy et al, Blackstone’s Criminal Practice 2001, 11th ed. (London: Blackstone, 2001) 1562 (‘since “magistrates are judges of both fact and law”, in borderline cases, it may be thought pedantic to require them to go through the motions of hearing defence evidence if they have found the prosecution evidence so unconvincing that they will not convict on it in any event.’).
442 Ibid., para. 10.
443 Ibid., para. 11 (emphasis added).
444 Ibid., para. 13.
already come to a conclusion as to the result of the case. It could not be correct to engender such lack of confidence in the judicial process.\textsuperscript{445}

Judge Pocar’s disagreement with the majority in \textit{Jelisić} hinged upon the same problem as the one addressed by Judge Shahabuddeen. Judge Pocar opined that reliance on the test that has evolved in the systems where the judges who decide upon a ‘no case’ submission are not the jurors who evaluate its credibility and issue a verdict would amount to a ‘mechanical’ application of the ‘no case’ procedure in the tribunal’s framework.\textsuperscript{446} As the ICTY judges are final arbiters of evidence, it serves no purpose to ‘leav[e] open the possibility that another trier of fact could come to a different conclusion if the Trial Chamber is itself convinced of its own assessment of the case’.\textsuperscript{447} Should the Chamber itself be convinced that the evidence does not suffice for the conviction, it must acquit after the close of the prosecution case, just as the Trial Chamber did in \textit{Jelisić} when it found that the required \textit{mens rea} ‘ha[d] not been proved beyond all reasonable doubt’.\textsuperscript{448} In support of this conclusion, Judge Pocar referred, first, to the presumption of innocence of the accused who is ‘not to undergo a trial when his innocence has already been established’ and, second, to the principle of judicial economy, as there is no ‘point in continuing the proceedings if the same judges have already reached the conclusion that they will ultimately adopt at a later stage’.\textsuperscript{449}

At the heart of Judge Pocar’s argument is the possibility that already at the Rule 98\textit{bis} stage the court would credit weight to evidence, apply the standard of ‘beyond reasonable doubt’, instead of the hypothetical test of whether a ‘reasonable tribunal could convict’, and extend the principle of \textit{in dubio pro reo} to the halfway stage. However, Judge Pocar does not consider potential prejudicial consequences for the accused of the application of an elevated legal test of ‘beyond reasonable doubt’, registered as essential by Judge Shahabuddeen and in the \textit{Kordić} and \textit{Kunarac} decisions.\textsuperscript{450} Nor does Judge Pocar indicate whether he considers it possible to avoid them by applying the ‘beyond reasonable doubt’ test asymmetrically—only in favour of the accused and not the prosecution—and how the Chamber would arrive at a mid-trial acquittal without taking the chance that its in-depth inquiry might lead to a premature conviction, if that standard is applied in a principled way and even-handedly. This approach leaves these questions unresolved. The court that decides that a ‘reasonable tribunal of fact could convict’ and then prematurely proceeds to determining whether it is in fact the tribunal that could convict, may find itself in a precarious situation where the answer given to that question might be in the positive.

Should the prosecution evidence be weighed definitively on its own (whereas it is the totality of evidence that ought to be weighted) and the determination made under ‘beyond reasonable doubt’, the decision not to acquit and to allow the case proceed to the defence phase would effectively amount to a judicial recognition that the prosecution has \textit{not} failed

\textsuperscript{445} \textit{Ibid.}, para. 14.
\textsuperscript{446} Partial dissenting opinion of Judge Pocar, \textit{Jelisić} appeal judgment (n 363), para. 5 (‘the conclusion reached by the majority of the Appeals Chamber is certainly suited to a system in which cases are eventually sent to a jury or to a trier of fact other than the judge who evaluates the evidence at that stage. In such a system, if a judge finds that, while he himself cannot be satisfied of the guilt of the accused, a different trier of fact could come to a conclusion of guilt, he cannot stop the proceedings. Should he apply a higher standard of evaluation of the evidence, he would try the facts himself, instead of leaving the task of doing so to the jury.’ Footnote omitted.) See also \textit{ibid.}, n2: ‘the issue should be approached prudently, avoiding the application, in a mechanical fashion, of national solutions without assessing whether they may require adaptations to the needs of the procedure..., and taking into account also the fact that they may result in disregarding the fundamental rights of the accused’.
\textsuperscript{447} \textit{Ibid.}, para. 6.
\textsuperscript{448} \textit{Ibid.}
\textsuperscript{449} \textit{Ibid.}
\textsuperscript{450} \textit{Kordić} and \textit{Čerkez} Rule 98\textit{bis} decision (n 361), para. 27; \textit{Kunarac et al.} Rule 98\textit{bis} decision (n 391), para. 5.
to satisfy that standard. This would effectively mean a finding of guilt at a halfway stage rather than until after the trial when a formal finding to that effect may be made. This approach is in a visible conflict with the presumption of innocence. The Chamber would thereby be registering the lack of a reasonable doubt regarding the guilt of the accused. During the defence phase, the defence would be presenting its evidence to the Chamber that has already indicated its view that the accused is not innocent, even if tentatively, before hearing defence evidence. For the Chamber itself, it would arguably not be impossible, but certainly more difficult to acquit the person after the trial where it has reached an opposite conclusion earlier.451 It might be expected that, because the bench consists of professional and impartial judges, the defence evidence could potentially raise ‘reasonable doubts’ as to the guilt in the judges’ minds and make them change their position in the course of the defence phase.452 But it ought to be recognized that the decision not to acquit made the standard ‘beyond reasonable doubt’ at the halfway stage would deliver an irreparable blow to the judges’ perceived impartiality by the moment they enter the deliberation room. The smack of judicial prejudice against the accused, as a result of the application of an incorrect standard of proof in mid-trial phase, would ruin the fairness of the trial.453 Thus, if the ‘beyond reasonable doubt’ threshold is employed at the Rule 98bis stage and the ensuing decision is not in favour of the accused, the accused who has the right is to remain silent throughout the trial, would be forced to present evidence in order to rebut the prosecution evidence and to challenge the ‘tentative’ conviction. A failure to do so would leave the Chamber with no other option than to definitively convict the accused on the strength of the Rule 98bis alone.454 It would not need to hold separate deliberations on the verdict. This outcome would reverse the presumption of evidence and render a fair trial impossible. By contrast, the consistent application of the hypothetical evidentiary standard (whether a reasonable tribunal of fact could convict on the strength of the prosecution evidence) would not attract these consequences. It would leave room for acquittal even where no defence evidence is called.455 This has actually occurred in the ICTY practice.456

This discussion illustrates the risks looming in judicial determinations on the guilt or innocence made at the halfway stage of trial under the ultimate standard of proof. Ironically, the laudable intention to ‘contextualize’ the ‘no case’ procedure in light of the institutional and legal framework of international trials and to ‘enhance’ their fairness and efficiency by applying a higher threshold for the purpose of an earlier acquittal, may in fact lead to the opposite result of undermining fairness.457 It is the position which favours the possibility of determining the innocence (and, by implication, the guilt) upon reaching the finding that ‘a

451 Kordić and Čerkez Rule 98bis decision (n 361), para. 27.
453 Kunarac et al. Rule 98bis decision (n 391), para. 5.
454 Kordić and Čerkez Rule 98bis decision (n 361), para. 27; Kunarac et al. Rule 98bis decision (n 391), para. 5.
455 In the same vein, see Klip, ‘Commentary’ (n 397), at 604 (pointing to the need for the Chamber to ensure consistency between a Rule 98bis decision and the final judgement, and, at the same time, to refrain from hinting at the provisional ideas about the final outcome of the trial).
456 Ramush Haradinaj and Idriz Balaj were acquitted on all counts without having made 98bis submissions and called any evidence. Judgement, Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, TC I, ICTY, 3 April 2008.
457 Cf. Zappalà, Human Rights in International Criminal Proceedings (n 376), at 94 n46, who accedes to Judge Pocar’s findings and arguing for the application of a ‘no reasonable trier of fact could acquit’ standard at the Rule 98bis stage (emphasis in the original). Given that a finding to that effect would amount to an irreversible determination of guilt, this approach does not solve the problem and would undermine the presumption of innocence rather than promote it.
reasonable tribunal could convicit’ in case at hand, rather than the majority’s approach of adhering to the limited hypothetical test, that amounts to the ‘tempting simple solution’.458

Turning the Rule 98bis procedure into a full-fledged substantial evaluation of evidence and the determination of the guilt or innocence detracts from the exclusive function of the final judgement. Being of a common law origin and rooted in the two-case dialectics, the Rule 98bis procedure will only operate fairly if the original standard of review is employed. Simplistic solutions adopted for the purpose of ‘contextualization’ might disrupt the delicate balance and logic of the procedural system. They must be carefully and critically reviewed in terms of the possible effects on the rights of the accused. This is the answer to the conceptual problem postulated earlier about the relevancy of the evidentiary standard of Rule 98bis in light of the special features of the tribunals’ institutional context.459 The mainstream practice at the ICTY, ICTR, and SCSL upholding the original standard of review, is therefore to be endorsed.

D. Applicability and scope

Given the magnitude of the Rule 98bis / 98 determinations in practice, despite their supposedly limited purport, the ICTY, ICTR and SCSL Chambers have adopted a rigid approach in respect of its applicability and scope. Thus, they have disallowed recourse to this procedure for purposes other than challenging the sufficiency or ability of evidence to support a conviction and curbed the attempts to use it at the stage other than the close of prosecution case. In Blaškić, the defence moved the Chamber for invocation of the broad power under Rule 54 in order to navigate around the limitations built in Rule 98bis. The motion was rejected with reference to lex specialist derogat generalis.460 In Kupreškić, the Chamber refused to consider the motion under Rule 98bis filed after the close of the defence case.461

This rigid approach has manifested itself on other occasions. The Chambers held that Rule 98bis may be used neither to seek to quash the indictment or challenge its form (which are the matters to be raised under Rule 72), nor to quash the counts, given that ‘the Prosecutor may not have called all possible witnesses or because the Prosecutor may not be proceeding against all possible perpetrators of alleged crimes’.462 Rule 98bis cannot be

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458 Cf. Bohlander, ‘Radbruch Redux’ (n 452), at 409 (‘Judge Pocar was able to see behind the tempting simple solution that commended itself on the clearly common-law based phenotype of the motion for acquittal and proceeded instead to compare the genotypes of the common-law and Continental understandings of the role of the trier of fact and its impact on the position of the defendant.’). The foregoing observations show, however, that the majority’s position is more consistent with the fundamental logic and principles of the process. If one is to adopt Bohlander’s genetics metaphor, the ‘phenotype’, or organization, of the procedure is not only a mere form that can easily be neglected; it in itself carries much of a ‘genotype’ with it.

459 See supra 3.2.4.A.

460 Blaškić decision on the motion to dismiss (n 420) (rejecting the defence motion to dismiss under Rule 54 with reference to the fact that ‘those decisions [in Tadić and Čelebići] were taken specifically because the current Rule 98bis did not exist and that, to remedy the fact that the Rules stated nothing in that respect, the Judges based their decision on the general procedural scope established in Rule 54.’).

461 Decision on the Motion of the Accused Vlatko Kupreskić of 23 July 1999 for Judgement of Acquittal, Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, TC II, ICTY, 28 July 1999, para. 3. See also Zappalà, Human Rights in International Criminal Proceedings (n 376), at 93 (suggesting that the Chamber should have clarified why the application of Rule 98bis by analogy is precluded) and Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 577 (in England and Wales, such submissions may also be made at the end of the defence case).

462 Semanzu Rule 98bis decision (n 406), paras 18-9; Nyiramashuhuko et al. Rule 98bis decision (n 425), para. 73; Bagosora et al. Rule 98bis decision (n 430), para. 7; Muvuny i Rule 98bis decision (n 432), para. 41; Ntagerura et al. separate opinion of Judge Williams (n 382), para. 6; Dissenting opinion of Judge Dolenc (oral), Transcript, Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, TC III, ICTR, 6 March 2002, at 56. But this is different from considering the titles of liability: see Decision on Defence Motion for the Judgement of Acquittal, Prosecutor v. Stakić, Case No. IT-97-24-T, TC II, ICTY, 31 October 2002, para. 101 (forms of
relied upon for examination of whether the defence has had insufficient notice of charges to sustain a conviction or whether there are any other legal defects in the indictment.\textsuperscript{463}

Finally, the ICTR has followed strictly the letter of Rule 98\textit{bis}, by refusing to inquire into the sufficiency of evidence in relation to the ‘offences’, as reflected in the paragraphs of the indictment, instead of ‘counts’.\textsuperscript{464} This approach was deemed consistent with the appropriate standard of review, because the examination of evidence per fact or incident would draw the Chambers into ‘an unwarranted substantive evaluation of the quality of much of the Prosecution evidence’, given that the indictment paragraphs are frequently interdependent.\textsuperscript{465} Even so, some ICTR Chambers ruled, however, that the accused should not be invited to rebut allegations in the paragraphs of indictment for which no evidence had been submitted, albeit that a conviction could have been sustained in relation to the respective count.\textsuperscript{466} Dismissing the paragraphs of an indictment unsupported by any evidence is reasonable and possible, even if Rule 54 is to be invoked, as it would be consistent with the obligation to ensure fair and expeditious proceedings with full respect to the rights of the accused. But the paragraph-by-paragraph analysis of an indictment at the Rule 98\textit{bis} stage was held not to be an absolute requirement.\textsuperscript{467}

As noted, Rule 98\textit{bis} of the ICTY contained reference to ‘offences’ before the 8 December 2004 amendment, and its approach has been more liberal in that period. In earlier cases, the Chambers deemed it possible to dismiss charges with respect to crimes in certain geographic locations as well as particular incidents or events.\textsuperscript{468} The SCSL approach was not very consistent in that respect. Despite that Rule 98 of the SCSL RPE refers to ‘counts’, one Chamber applied it also to test the sufficiency of evidence in relation to specific incidents or locations underpinning the counts.\textsuperscript{469}

In conclusion, whilst it has not occurred in practice that the accused was cleared of all charges as a result of the Rule 98\textit{bis} determination, acquittals on one or several counts

\textsuperscript{463} Semanza Rule 98\textit{bis} decision (n 406), para. 18; Bagosora \textit{et al.} Rule 98\textit{bis} decision (n 430), para. 7; 
Muvunyi Rule 98\textit{bis} decision (n 432), para. 41; Ndindiliyimana \textit{et al.} Rule 98\textit{bis} decision (n 425), para. 8.


\textsuperscript{465} Bagosora \textit{et al.} Rule 98\textit{bis} decision (n 430), para. 9; Muvunyi Rule 98\textit{bis} decision (n 432), para. 39.


\textsuperscript{467} Karemera \textit{et al. II Rule 98\textit{bis} decision} (n 464), para. 4 (‘the promotion of a fair trial does not require a paragraph by paragraph analysis of the indictment to eliminate any allegation on which evidence has not been led, or to evaluate the quality of evidence that has been adduced. In any event, such an analysis is not appropriate to this case, where the indictment contains inter-dependent allegations describing a series of events which seeks to cumulatively establish a systematic, continuing criminal campaign.’).

\textsuperscript{468} Kordić and Ćerkez Rule 98\textit{bis} decision (n 361), para. 35; Kvočka \textit{et al.} Rule 98\textit{bis} decision (n 438), para. 9; 
Kumarac \textit{et al.} Rule 98\textit{bis} decision (n 391) (entering acquittal with respect to some incidents of rape); Galić Rule 98\textit{bis} decision (n 425), para. 12; Separate opinion of Judge Patrick Robinson, S. Milošević Rule 98\textit{bis} decision (n 363), paras 15-7.

\textsuperscript{469} See Sesay \textit{et al.} oral Rule 98 decision (n 425), at 41-5; Annex B ‘Procedural History’, Judgement, 
have not been uncommon.\textsuperscript{470} Insofar as this allowed sparing the defence the need to present evidence and labour under defunct charges, the fairness and efficiency benefits warrant retaining this procedure.\textsuperscript{471} Despite its limited purport and scope, the Rule 98\textsuperscript{bis} / 98 procedure has proved to be a necessary and useful procedural tool in the practice of the ICTY, ICTR, and SCSL: necessary because it gives effect to the presumption of innocence, and useful because, as a filtering mechanism, it allows saving valuable court resources by not allowing a fundamentally defective prosecution case reach the defence phase. On the latter issue, a reservation is in order that before the ICTY, the Rule’s function to expedite proceedings had remained theoretical until the procedure was rendered fully oral. The written procedure retained by the ICTR might give rise to similar concerns, but those concerns have not been deemed sufficiently grave by the ICTR judges to make them follow the suit with the further amendment of the Rule.

3.3 ICC

3.3.1 General features

A. Order of presentation at trial: A comparative outlook

Article 69(3) of the ICC Statute stipulates that ‘[t]he parties may submit evidence relevant to the case, in accordance with article 64’.\textsuperscript{472} The latter merely provides that ‘[s]ubject to any directions of the presiding judge, the parties may submit evidence in accordance with provisions of this Statute’.\textsuperscript{473} The open-textured character of the ICC procedural law governing the structure and modalities of the presentation of evidence has already been pointed out in the context of the discussion on the ICC proceedings meant to set the stage for trial.\textsuperscript{474} The ‘open-endedness’ of the ICC trial process entails the obligation for the Chamber to conduct consultations with the parties (Article 64(3)(a) of the ICC Statute) and to issue orders and directions on the conduct of proceedings on a wide range of issues prior to trial (Article 64(8)(a) of the Statute). This includes the order and manner of the submission of evidence to the Trial Chamber. Like the ICC Statute, the ICC Rules are inconclusive as to how trials are to be structured and conducted, particularly in terms of the number and sequence of cases to be presented. This is less so with respect to the order and modes of examining witnesses, given that limited guidance is provided by the general principles codified in Rule 140(2).

As regards the structure of trial and the order of presentation of evidence, the procedural regime is highly flexible. Rule 140(1) provides that where the presiding judge does not give directions for the conduct of trial under Article 64(8), the parties shall agree on the order and manner in which the evidence shall be submitted, failing which the presiding judge shall issue directions. Accordingly, subject to the ICC’s structural and institutional

\textsuperscript{470} See e.g. Transcript (oral decision), \textit{Prosecutor v. R. Delić}, Case No. IT-04-83-T, TC I, ICTY, 26 February 2008, which is the example cited in Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 589.

\textsuperscript{471} Cf. Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 588 (noting that whilst ‘some defendants certainly succeeded in obtaining a reduction of some of the charges against them, or in gaining recognition that there is no evidence to support specific factual allegations’, ‘it is rare.’). \textit{Ibid.}, at 589 (‘the consideration at the close of the prosecution case, of any matter other than those counts for which there is no evidence whatsoever is a fruitless exercise. …The superficial review carried out of all prosecution evidence for the purposes of Rule 98\textsuperscript{bis} achieves almost nothing.’)

\textsuperscript{472} Noting that Art. 69(3) ‘was adopted on a German proposal and aimed at incorporating some of the principles of the continental legal tradition into the procedural part of the Statute’: Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 10), at 1487 (with reference to Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II. Compilation of Proposals, at 207).

\textsuperscript{473} Art. 64(8)(b) ICC Statute.

\textsuperscript{474} Chapter 8.
features, the ICC trials can be constructed equally from the adversarial or the inquisitorial mold, or even represent a novel model altogether. Since the ICC trial procedure is apt to be adopted on an ad hoc basis, albeit in light of the past experience, this regulatory model can be described as ‘variable’. The variety of options is available to the Trial Chambers, and no strong indications of normative preference can be traced in the Court’s legal instruments for any specific domestic trial model.

To a greater extent than the ad hoc tribunals’ frameworks, the ICC Statute and Rules eschew the terminology associated with the legal-cultural baggage of specific procedural traditions. The ICC framework shies away from using the notions such as ‘prosecution case’, ‘defence case’, ‘case-in-chief’, ‘rebuttal’ or ‘rejoinder’ – the characteristic descriptions of constituent elements of common law trials which carry connotations dictated by the respective domestic legal vocabulary. Nor does it expressly envisage those as distinct sub-phases of proof-taking. The attempts to read into the indeterminate, or variable, ICC trial model the features portending its civil law (or common law) inclination are far-fetched and would blur the line between lex lata and one’s views on what is lege ferenda. Unlike a criminal court in civil law jurisdictions (for example, Germany), the ICC Trial Chamber is not duty-bound to expand its fact-finding enquiry until it is satisfied that the ‘material truth’ in the case can be established, either by calling all evidence or by asking witnesses all questions deemed necessary for that end. Both the power to ‘request the submission of all evidence … necessary for the determination of the truth’ and the power to question witnesses are formulated as prerogatives and not statutory duties of the Trial Chamber. Despite its importance, the ‘inquisitorial’ exception to the statutory ambiguity embodied in the prosecutor’s duty to investigate both incriminating and exonerating circumstances equally under Article 54(1)(a) does not have an influence on the duties of the trial court. Its implications for the nature of the ICC trial process are far from obvious and will be qualified by other systemic factors.

If one is to delineate the choices available to the ICC in determining the trial sequence, there are several comparative ‘extremes’ that could serve as points of departure to the Trial Chambers when developing procedure in individual cases. If the presentation is structured in accordance with what can be referred to as an ‘adversarial model’, the sequence of cases—there would be several of them—would reflect, mutatis mutandis, the sequence adopted by the ad hoc tribunals. The evidentiary phase of the ICC trial would consist of: (i) the case-in-chief composed of two consecutive cases—the first case for the prosecution and the second for the defence, in line with the principle of non-reversal of the

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475 Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, Prosecutor v. Lubanga, ICC-01/04-01/06-2727-Red, TC I, ICC, 28 April 2011 (‘Lubanga rebuttal decision’), para. 36 (‘The Rome Statute framework does not create different stages of the case, such as “the prosecution case”, “the defence case”, “evidence in rebuttal” or “rejoinder evidence”.’); Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve de trois photographies”, ICC-01/04-01/06-2404, TC I, ICC, 29 April 2010 (‘Lubanga trial decision of 29 April 2010’), para. 26 (‘The Rome Statute framework does not apply fixed stages for the presentation of evidence during the trial, and in this the ICC differs from the position in some other courts or tribunals …. Article 64(8)(b) of the Statute, and Rule 140(1) of the Rules of Procedure and Evidence essentially leave it to the Chamber to determine the model to be followed instead of applying a mechanistic formula.’).


477 Art. 69(3) ICC Statute and Rule 140(2)(c) ICC RPE.


479 Rule 85(A) ICTY, ICTR and SCSL RPE. See supra 3.2.1.
burden of proof—and, possibly, some other evidence called or allowed by the Chamber (Chamber evidence and victims’ evidence); (ii) the second round of evidentiary presentations, including prosecution evidence in rebuttal and defence evidence in rejoinder. Under this scenario, the primary principle of organizing the sequence of evidence blocks is per party (or participant), and as each distinct case is expected to address all topics raised by the charges, it will internally be organized per topic. If the ‘adversarial model’ is implemented in its pure form, the evidence is only to be presented by the parties, whilst the victims participating in the proceedings would not be entitled to present ‘their’ case. The evidentiary participation of victims might generate tensions within the model based on the dialectical opposition between the parties’ cases. As will be shown, this purist approach is not reflected in the actual trial practice of the ICC.

On the other end of the spectrum lies the ‘inquisitorial’ approach to organizing the ICC trial. Nothing in the ICC legal framework seems to preclude any Trial Chamber from endowing the evidentiary phase in the case before it with a strong ‘inquisitorial’ flavour. In that case, the presentation of evidence would not hinge on the formal distinction between the two (or more) opposing cases. The single case of the Court is to be probed by the judges and the parties during the trial. The primary principle for sequencing the evidentiary blocks is not the originator of evidence, but content-based criteria or topics, which may include crimes or incidents, categories of crimes, localities or year of commission, the character of the accused and other information relevant to sentencing, etc. Within each thematic block, the Chamber would determine the order in which to hear individual witnesses. For that purpose, it might also draw a distinction between the evidence offered by different actors. In any event, the defence would have to be given the ‘last word’ in terms of calling or questioning witnesses, since the adoption of the ‘inquisitorial style’ would not obviate the need for the prosecution to discharge its burden of proof.

While the ICC trial could theoretically follow the ‘inquisitorial’ format, the possibility for them to be purely ‘adversarial’ is nil. The term ‘quasi-adversarial’ would be a more fitting label of the first model as described above because the ICC trials cannot fully emulate the undiluted ‘adversarial’ presentation order, in light of the ICC law and actual practice regarding victim participation. First, the Statute allows the participation of victims in the proceedings in the form of expressing their ‘views and concerns’, possibly extending to the evidentiary phase and subject to the conditions prescribed in Article 68(3): (i) whether the victims’ personal interests are affected; (ii) whether the evidentiary stage is appropriate for their participation; (iii) the manner of their participation should not be inconsistent with a fair trial or be prejudicial towards the accused. Thus, especially where the Chamber interprets Article 68(3) as authorizing it to allow victims to tender evidence going to the guilt or innocence of the accused, by way of expressing ‘views and concerns’, the structure of trial will have to undergo necessary adjustment, such as envisaging a

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480 Art. 67(1)(i) ICC Statute. Under this scenario, there might exist a procedure regarding motions for judgment of acquittal at the close of the prosecution case, by analogy with ICTY and ICTR Rules 98bis; see infra 3.3.6.

481 On the ‘thematic’ structure of the presentation of evidence, see Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 478), at 506 (suggesting possible thematic blocks such as ‘particular crimes or incidents’, ‘background information’, ‘issues regarding the responsibility of the accused’ and ‘technical topics requiring expert evidence’).

482 Arts 66, 67(1)(g) and (i) ICC Statute. See also Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Devise the Proceedings’ (n 478), at 506.

483 C. Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’, (2003) 1 JICJ 603, at 605 (‘Taken as a whole, trials before the ICC will not represent pure forms of either the adversarial or the inquisitorial models.’). However, the eventuality of some ICC Chamber adopting a pure inquisitorial model (or nearly so) cannot be excluded.

situation in the CAR
s a decision, 01/09-01/11-460, TC V, ICC, 3 October 2012 ('the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Art. 69(3) of the Statute. … [V]ictims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has “requested” the evidence.’).

487 See also H. Friman, ‘The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?’, (2009) 22(3) Leiden Journal of International Law 485, at 494 (‘a clever construct, but one that prompts a number of questions’).

485 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’), para. 108, upheld in Judgement on the appeal of the Prosecutor and the Defence against the Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, AC, ICC, 11 July 2008 (‘Lubanga victim participation appeal decision’), paras 93-105; Decision on the Modalities of Victim Participation at Trial, Prosecutor v. Katanga and Ngudjolo, Situation in the DRC, ICC-01/04-01/07-1788-ENG, TC II, ICC, 22 January 2010 (‘Katanga and Ngudjolo victim participation trial decision’), paras 81-101, upheld in Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-2288, AC, ICC, 16 July 2010 (‘Katanga and Ngudjolo appeal judgement on victim participation at trial’), paras 37-40; Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-807-Corr, TC III, ICC, 12 July 2010 (‘Bemba victim participation trial decision’), paras 29 and 36; Order regarding applications by victims to present their views and concerns or to present evidence, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-1935, TC III, ICC, 21 November 2011, para. 17; Decision on supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2138, TC III, ICC, 22 February 2012 (‘Bemba trial decision on victim evidence’), paras 10-8; Decision on victims’ representation and participation, Prosecutor v. Ruto and Sang, Situation in Kenya, ICC-01/09-01/11-460, TC V, ICC, 3 October 2012 (‘Ruto and Sang victim participation decision’), para. 77.)

B. Quandary of victim evidence

The Lubanga Trial Chamber pioneered the approach of according the participating victims’ legal representatives with a possibility of leading, and challenging the admissibility of, evidence on the guilt and innocence of the accused, upon authorization of the Chamber and subject to requirements of Article 68(3) of the Statute. It based this position not on any explicit entitlement of victims to that effect found in the ICC law, but on the power available to the judges to request the submission of all evidence necessary for the determination of the truth in accordance with Article 69(3) of the Statute. The evidentiary role of participating victims at trial was conceptualized in terms of the possible assistance with the establishment of the truth they could provide to the Trial Chamber. Anchoring this evidentiary role to the Trial Chamber’s Article 69(3) power exemplifies an expansive, controversial, and—admittedly—inventive interpretation of the ICC’s legal framework. The same rationale for the victims’ participation in the truth-finding process, grounded in the exercise by the Trial
Chapter 10: Presentation and Examination of Evidence

Chamber of its *ex officio* power, was endorsed in subsequent trials and became the mainstream approach.\(^{488}\) Next to Article 69(3), the Lubanga Chamber referred to Rule 91(3), which enables victims’ legal representatives to question witnesses with leave of the Chamber (including experts and the defendant). It held that the Rule does not limit this conditional right to witnesses called by the parties. While the Rule is clear that victims may participate, through their legal representatives and with the Chamber’s leave, in the questioning of witnesses, it is far-fetched to invoke it as the legal ground for their supposed role in calling evidence on the guilt or innocence. If the drafters of the Statute did not intend victims to present such evidence, it would be illogical for them to insert a respective limitation in Rule 91(3). Both Article 69(3) and Article 64(8)(b) state that the parties, i.e. the prosecution and the defence, may submit evidence. The second sentence of Article 69(3) explicitly authorizes the parties to submit evidence and does not mention victims. The Chamber’s power to request the submission of evidence additional to that already presented must arguably be subject to provisions establishing who is competent to submit evidence. Furthermore, Article 64(6)(d) authorizes the Chamber to ‘[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties’.

The Trial Chamber’s decision of 18 January 2008 was appealed and the issue of the possibility for victims participating at trial to lead evidence as to the guilt or innocence and to challenge the admissibility or relevance thereof came before the Appeal Chamber. The trial decision was upheld in this respect, but the Chamber was split on the matter, with Judge Pikis and Judge Kirsch issuing strong dissents.\(^{489}\) The majority emphasized that the right to lead evidence pertaining to guilt or innocence and the right to challenge its admissibility lies primarily with the parties, with reference to ‘numerous provisions which support this interpretation’.\(^{490}\) The majority cited provisions regarding the role of the prosecutor in investigating, formulating the charges, and proving the guilt of the accused, as well as the regime for disclosure, which is addressed clearly to the parties and does not envisage disclosure by the victims.\(^{491}\) It found that ‘[p]resumptively, it is the Prosecutor’s function to lead evidence of the guilt of the accused’ but nevertheless concluded that the provisions cited do not preclude the possibility for victims to lead or challenge admissibility of such evidence.\(^{492}\)

In support of that conclusion, it pointed to Article 66(3), which stipulates that in order to convict, the Court ‘must be convinced of the guilt of the accused beyond reasonable doubt’. According to the Appeals Chamber, this is the reason why the statutory powers of the Court to call additional evidence and/or all evidence necessary for the determination of the truth (Articles 64(6)(d) and 69(3), second sentence), must prevail over the provisions on the onus of proof and the presentation of evidence by the parties (Articles 64(8)(b), 66(2), and 69(3), first sentence). Secondly, the majority underscored that in order to ‘give effect to

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\(^{488}\) Katanga and Ngudjolo victim participation trial decision (n 485), para. 60 (‘the only legitimate interest the victims may invoke when seeking to establish the facts which are subject of the proceedings is that of contributing to the determination of the truth by helping the Chamber to establish what exactly happened. They may do so by providing it with their knowledge of the background to the case or by drawing its attention to relevant information of which it was not aware. In the latter case, the Chamber may also deem it appropriate for a particular victim to testify in person.’) See also ibid., paras 65, 82-84, 91 and 96.

\(^{489}\) Lubanga victim participation appeal decision (n 485), paras 86-105; see also Partly Dissenting opinion of Judge G.M. Pikis, ICC-01/04-01/06-1432, 11 July 2008; Partly Dissenting Opinion of Judge Philippe Kirsch, ICC-01/04-01/06-1432-Anx, 24 July 2008.

\(^{490}\) Lubanga victim participation appeal decision (n 485), para. 93.

\(^{491}\) Ibid. The AC cited Arts 15, 53, 54, 58, and 61(5) ICC Statute as well as Art. 66(2), which imposes the onus to prove the guilt on the prosecutor.

\(^{492}\) Ibid., paras 93-4.
the spirit and intention of article 68(3) of the Statute in the context of trial proceedings it must be interpreted so as to make participation by victims meaningful. 493

In an odd turn of reasoning, the Chamber stated that evidence to be tendered at trial which does not relate to the guilt or innocence of the accused would ‘most likely be considered inadmissible and irrelevant’; precluding victims generally from leading or challenging such evidence would have rendered their participatory rights at trial ‘inefffectual’. This foreshadows and unnecessarily limits the competence of the Trial Chamber, which is seized with the issues of admissibility of evidence.494 The majority inappositely excluded from the scope of admissible and relevant evidence any items relevant to sentencing (e.g. character evidence) and reparations (e.g. the scope and nature of harm suffered by the victims). Such evidence may also be presented at trial, despite the possibility of holding separate sentencing and reparation hearings.495

The Appeals Chamber recognized that the possibility for victims to lead evidence and challenge its admissibility is not an unfettered right. As the Trial Chamber had found, it is subject to the authorization of that Chamber, which will hinge on safeguards of fairness for the accused and imposition of the onus of proof on the prosecution.496 The Trial Chamber’s control over this participatory modality and other preconditions listed will indeed be essential ensuring its balanced operation. However, this does change the fact that the Appeals Chamber’s position is inconsistent with the fundamental logic of its previous judgments drawing a line between the personal interests of victims and the role of the prosecutor.497 In light of the direction the earlier jurisprudence had been taking, this turn in the case law was perplexing.498

493 Ibid., para. 97.
494 Art. 64(9)(a) ICC Statute (‘The Trial Chamber shall have, inter alia, the power on application of the party or on its own motion to …[r]ule on the admissibility or relevance of evidence’); see also Art. 69(4) ICC Statute (referring to the Court rather than the Chamber).
495 Art. 76(1) ICC Statute (‘In the event of conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.’); Regulation 56 Regulations of the Court (‘The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with Art. 75, paragraph 2, at the same time as for the purposes of trial.’). According to Art. 76(2) and (3) ICC Statute, except for cases of admission of guilt and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to sentencing, as well as any representations regarding reparations, including those submitted by victims as per Art. 75(3) ICC Statute. (Emphases added.)
496 Lubanga victim participation appeal decision (n 485), para. 104 (affirming the TC’s ruling on the procedure and the limits within which its discretion is to be exercised: (i) a discrete application; (ii) notice to the parties; (iii) demonstration of personal interests that are affected by the specific proceedings; (iv) compliance with disclosure obligations and protection order; (v) determination of appropriateness; and (vi) consistency with the rights of the accused and a fair trial).
497 Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-925, AC, ICC, 13 June 2007, para. 28 (‘any determination by the Appeals Chamber of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis. Clear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations. More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor’. – Footnotes omitted.); Separate opinion of Judge Georgios M. Pikis, ibid., para. 15 (‘Participation is confined to the expression of the victims’ “views and concerns”. It is a highly qualified participation limited to the voicing of their views and concerns. Victims are not made parties to the proceedings nor can they proffer or advance anything other than their “views and concerns”) and 16 (‘In relation to what can victims express their views and concerns? Not in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor (Art. 66 (2) of the Statute). Provision is made in the Statute (Art. 54 (1)) for the Prosecutor to seek and obtain information from victims about the facts surrounding the crime or crimes forming the subject-matter of the proceedings. … It is not the victims’ domain either to reinforce the prosecution or dispute the defence.
These aspects of majority’s ruling were taken up in the two dissents. Both Judge Pikis and Judge Kirsch strongly disagreed with the majority in that victims may present evidence on the guilt or innocence and challenge its admissibility or relevance. In line with his previous opinions, Judge Pikis substantiated his position by provisions reserving the competence to submit evidence to the parties and placing the burden of proof on the OTP; he also emphasized the defendant’s right not to be confronted with multiple accusers. In a similar vein, Judge Kirsch assigned the role of leading the evidence relating to the guilt and innocence of the accused exclusively to the parties. He illustrated the point that it was not the drafters’ intention that victims should lead evidence, *inter alia*, by the fact that disclosure foreseeable by the Statute and Rules does not entail obligations of the victims. According to Judge Kirsch, the safeguards to ensure the balanced participation by victims do not mitigate the concern that their acquired right to present evidence for the purpose of the verdict in inconsistent with Article 68(3), including the ordinary understanding of ‘views and concerns’, and Rule 91(3). As for the right to challenge the admissibility and relevance of evidence, Judge Kirsch was of the view that such routine challenges would be inappropriate but in limited circumstances where the submission of evidence by the parties affects the victims’ personal interests, they may allowed to express their views and concerns.

The question whether victims are to be permitted to call evidence, in exercise of the Trial Chamber’s fact-finding competence, may well be one of the most mind-boggling aspects of the ICC’s approach to organizing its trial process, even though it is now well entrenched. The possibility for the victims, who are called *participants* rather than *parties*, to tender evidence on the guilt and innocence, borders too closely at the prerogative of parties. It may indeed be questioned whether this distinction between parties and participants is meaningful, given that the victims’ substantive interest in the verdict became judicially recognized and they were provided with the means to pursue that cause: an autonomous ‘case’ to be litigated at trial through the submission of evidence. The main implication of allowing victims to call evidence on the nature of the ICC trials is that Trial Chambers are

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Participating victims’ views and concerns are referable to the cause that legitimizes their participation, the cause that distinguishes them from other victims, namely their personal interests to the extent they are affected by the proceedings.’).

497 Kirsch, ‘The Trial Proceedings before the ICC’ (n 476), at 277.


499 Partly Dissenting opinion of Judge G.M. Pikis (n 489), paras 5 et seq.

500 Partly Dissenting Opinion of Judge Philippe Kirsch (n 489), paras 5 et seq.

501 *Ibid.* paras 30 (‘On an ordinary understanding of those words [“views and concerns”], they do not equate to an ability to lead evidence on guilt. It would, in my view, be perfectly legitimate for victims to present their views and concerns in relation to the evidence submitted by the parties where it affects their personal interests. However, there is a sizeable difference between presenting their views and concerns in relation to issues that arise at the trial that affect the personal interests of victims and presenting a prosecution case by leading additional evidence – independent of that led by the Prosecutor – on guilt.’) and 32 (‘Far from lending support to the idea that victims should be permitted independently to lead evidence on guilt, [Rule 91(3)] emphasises, in my view, the more limited role that was assigned to the victims during the course of a trial, when compared with that provided to the parties. Rule 91 falls within a subsection of the Rules relating specifically to the participation of victims in the proceedings. ... there is no reference to victims leading evidence pertaining to guilt or innocence in Rule 91 itself or within the section of the Rules in which it appears. On a matter of such fundamental importance, a provision to deal with this subject would have been expressly included, had it been the intention of the drafters for victims to lead such evidence.’).


503 Friman, ‘The International Criminal Court and Participation of Victims’ (n 487), at 492 and 500 ("The determination that victims may lead and challenge evidence pertaining to guilt or innocence at trial pushes the role of the “participant” very far, indeed so far that it is difficult to avoid the notion of their in fact being “parties”.").
not limited to the evidence presented by the parties. The trial judges may have at their
disposal the proof which casts the ‘third perspective’ on the matters relevant to the case
and which none of the parties is interested in calling. As the Chamber will therefore have access
to a more comprehensive evidentiary basis than an ‘adversarial’ court, this may enhance its
autonomous truth-finding function. While the provision of the ‘third case’ may fit well into
the ‘inquisitorial’ paradigm, this does necessarily render the ICC trials ‘inquisitorial’ by
nature. While the proponents of either national tradition might be inclined to recognize its
features in the ICC trial system, that model is indeterminate and, when taking a more
defined shape in individual cases, would still be of a sui generis nature.

Another noteworthy issue regarding victim evidence is the possibility for
participating victims to testify in person. In *Lubanga*, the Trial Chamber authorized such
testimonial, with reference to its ex officio mandate of establishing the truth. During
the trial, three of the participating victims testified in January 2010 and evidence was presented
on behalf of the school with the status of victim. The same approach of allowing a dual
status of victim-witnesses was adopted by the *Katanga and Ngudjolo* Trial Chamber. That
Chamber heard testimony of two victims called by legal representatives between 21 and 25
February 2011. The dual status of victim-witnesses may raise objections from the
perspectives of truth-finding and fairness for the accused. As participants with a judicially
recognized ‘personal interest’ of the outcome of the process, victim-witnesses have a
discernible incentive to testify in the way conducive to the desired outcome and adjust their
testimony to fit a respective party’s case or their own case, when called by legal
representatives. This factor may be seen as augmenting the risks of perjury and raises the
question whether participating victims are inherently unreliable and whether the admission
of such evidence is prejudicial. Notably, in countries in which victims participate in the
proceedings as civil parties (e.g. France and Belgium), they may not have a dual status and
testify as witnesses.

The novelty of the dual status and related epistemic concerns are known to the ICC
Trial Chambers. They have consistently emphasized that the evidentiary contributions by

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504 *Lubanga* victim participation trial decision (n 485), para. 132-4 (‘Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as witnesses during the proceedings. … the Chamber is satisfied that the victims of crimes are often able to give direct evidence about the alleged offences, and as a result of a general ban on their participation in the proceedings if they may be called as witnesses would be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber’s obligation to establish the truth.’).


506 *Katanga and Ngudjolo* victim participation trial decision (n 485), paras 88 and 89 (‘it would be contrary to the Chamber’s obligation to establish the truth if it were to exclude highly relevant and probative testimony of witnesses for the sole reason that they have also been authorized to participate in the proceedings as victims. … if the victim were authorized merely to make a written statement, that could not be taken into account in the final judgment, which would be contrary to the objective of contributing to the determination of the truth that justified intervention of by victims.’). *Ibid.*, paras 110 (‘neither the Statute nor the Rules prohibit victim status from being granted to a person who already has the status of a prosecution or defence witness. Similarly, rule 85 of the Rules does not prohibit a person who has been granted the status of victim from subsequently giving evidence on behalf of one of the parties.’) and 114-7.


508 E.g. *Katanga and Ngudjolo* victim participation trial decision (n 485), paras 108-9 (the *Katanga* defence expressing concern with the dual status of victim-witnesses 161 and 166 scheduled to testify at trial for the prosecution).

509 Art. 335(6) Code of Criminal Procedure (France, Code de procédure pénale) (‘The following people may not give evidence under oath: … 6° the civil party’); *Katanga and Ngudjolo* victim participation trial decision (n 485), para. 88.
victim-witnesses are subordinate to the right of the accused to a fair and expeditious trial.\footnote{Labanga victim participation trial decision (n 485), para. 134; Katanga and Ngudjolo victim participation trial decision (n 485), para. 88.} In Katanga, Trial Chamber II pointed out three major safeguards neutralizing the truth-distorting inclinations of victims’ testimony, whether called by the legal representatives of the prosecution. First, as any witness evidence, such testimony is subject to cross-examination by the defence, which will normally be capable of bringing out its weak aspects and inconsistencies.\footnote{Katanga and Ngudjolo victim participation trial decision (n 485), para. 88.} Second, if a victim testifies falsely, he or she is liable to prosecution under Article 70(1)(a), which must be a compelling dissuading factor.\footnote{Ibid.} Third, the ICC procedure, like that in other tribunals, does not envisage strict rules for the admission of evidence.\footnote{Art. 69(4) ICC Statute (‘The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.’ Emphases modified.)} Therefore, it is incumbent on the Chamber to decide on the appropriateness of victim’s testimony in person, in light of its probative value.\footnote{Katanga and Ngudjolo victim participation trial decision (n 485), para. 90.} The Chamber also deemed it relevant that victim-witnesses’ testimony for prosecution would be heard at the end of the prosecution case and, possibly, after other witnesses testifying on the same matters. In the view of the Chamber, this ‘would inevitably diminish the impact of his testimony’ and would be relevant for the assessment of its probative value.\footnote{Ibid., para. 116.} With regard to two victims due to testify for prosecution (witnesses 161 and 166), Trial Chamber II emphasized that those witnesses ‘must not under any circumstances become privy to the testimony of the other prosecution witnesses’.\footnote{Ibid., para. 114.} At the same time, due to the public nature of the trial, it could not rule out that those witnesses could have access to some evidence through broadcasts and underscored the need for the legal representatives to bring the content of Rule 140(3) to the attention of the victim-witnesses.\footnote{Ibid.}

C. Examination of witnesses

By contrast to the silence in the ICC legal framework on the order of presentation of evidence by parties (and participants), it does regulate the sequence and modes of questioning witnesses by the actors at trial and establishes a frame of reference that the Trial Chambers are to use when ruling on the conduct of testimony. Rule 140(2) provides four ‘model principles’\footnote{Kirsch, ‘The Trial Proceedings before the ICC’ (n 476), at 277.} on the manner in which witnesses ‘may be questioned’. It has been a matter of controversy whether those principles are merely authoritative or mandatory for the Chamber. On the one hand, Rule 140(2) extends the application of the model principles to ‘all cases’, which may be interpreted as asserting their binding nature.\footnote{See P. Lewis, ‘Trial Procedure’, in R. Lee et al. (ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Ardsley: Transnational, 2001) 550. Lewis considers the addition of the clause ‘in all cases’ in the chapeau of Rule 140(2) at the fifth session of the Preparatory Commission in 2000 as ‘[t]he most important amendment of all’. According to him, this means that, the Court’s directions may not depart from any of the ‘principles’ set forth in that Rule.} On the other hand, the same sub-Rule stipulates that the principles are subject to Articles 64(8)(b) and 69(4) which raises the spectre of their possible modification by the Presiding Judges. It is true that
Rule 140(2)(a) and (b) would be difficult to depart from without impinging upon other principles governing the conduct of trial (Article 67 of the ICC Statute). Still, the Chamber may arguably decide not to follow Rule 140(2)(c) and (d) that govern the sequence of the Chamber’s own questions and the defence’s right to examine a witness last, given the use of ‘may’ rather than ‘shall’ in the chapeau of that Rule.  

In accordance with Rule 140(2), the examination of witness at trial may be conducted in accordance with the following guidelines: (a) a party that submits evidence by way of a witness, has the right to question that witness; (b) the prosecution and the defence have the right to question a witness about relevant matters related to the witness’ testimony and its reliability, the credibility of the witness and other relevant matters; (c) the Trial Chamber has the right to question a witness before or after a witness is questioned by the prosecution and the defence; and (d) the defence shall have the right to be the last to examine a witness. Lastly, as the chapeau makes clear, these prongs are also subject to Rule 88(5), which obliges the Chamber to take into consideration that violations of the privacy of a witness or victim may create risk to her security and be vigilant in controlling the manner of questioning of a witness or victim ‘so as to avoid any harassment or intimidation’, particularly in cases of crimes of sexual violence. In addition, Regulation 43 of the Regulations of the Court further obliges the presiding judge, when determining the mode and order of questioning witnesses and presenting evidence in consultation with fellow judges, to be guided by the need to: (a) make those fair and effective for the determination of the truth; and (b) avoid delays and ensure the effective use of time.

Obviously, Rule 140(2) is far from detailed or robust and comes down to regulations that ‘fairly bland and uncontroversial’. It may be surprising that in a thorough codification effort such as the ICC Rules, which could have been expected to address the procedural questions left unresolved by the Statute, the matter as important as testimonial sequencing and modalities is not set out in much detail. The reason is that agreement on more detailed provisions was not forthcoming given the insurmountable differences between ‘common law’ and ‘civil law’ delegations to the Preparatory Commission. Lewis reports that Rule 140 has been ‘one of the most controversial of all the Rules’. Like with the negotiations on Article 64 of the ICC Statute in Rome, the delegations to the PrepCom failed to produce the more specific regulations, due to the common law v. civil law opposition. Given the vigorous debates on the Rule 140(2) principles, the various Trial Chambers are likely to treat them as binding because they represent the drafters’ uneasy consensus. Indeed, as will be shown, the directions for the conduct of trial issued by the Chambers under Rule 140(1) so far and any agreements between the parties and/or directions have not departed from the ‘model principles’.

520 Kirsch, ‘The Trial Proceedings before the ICC’ (n 476), at 277 (noting that the four model principles ‘are clearly not binding’).
521 Rule 140(2) ICC RPE.
522 Lewis, ‘Trial Procedure’ (n 519), at 549.
523 But see ibid., at 548 and 550 (noting that while certain countries, like France and US, actively promoted their own legal traditions, other delegations, e.g. Australia, Netherlands, Colombia and other Latin American countries, constructively crossed the civil law v. common law divide).
524 Ibid., at 547 (recollecting that the ‘problems [with Rule 140] began during the informal intersessional meeting held at Siracusa in June 1999 and were only finally resolved in the fifth Preparatory Commission in June 2000’) and 549 (describing the negotiation on Rule 140(2) during the July 1999 Preparatory Commission as a ‘battle’ and ‘tense and prolonged’, to the extent that the ‘febrile atmosphere’ threatened to affect the discussions in the other Working Group). See also S.A. Fernández de Gurmendi and H. Friman, ‘The Rules of Procedure and Evidence of the International Criminal Court’, (2001) 3 Yearbook of International Humanitarian Law 289, at 295-6 (explaining, in relation to Rule 140, that the broad terms of Art. 64(8)(d) authorizing the Presiding Judge of the TC to give directions on the conduct of trial ‘opened the door to a surprisingly bitter debate’ between the proponents of the civil law tradition, who believed that the Rules should not supplement the Article, and those of the common law tradition, who insisted on having a predictable trial regime as a matter of fairness towards the accused).
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The need for a rule that would detail Article 64(8)(b) was pointed out by some common law delegations (in particular, the US) already at the 1999 Siracusa informal inter-sessional meeting. The concern was that the absence of additional guidance in the Rules would enable the adoption of procedure on a case-by-case basis, which would deprive the parties of a minimum necessary degree of procedural certainty.525 This problem was not solved by draft Rule 140(1) elaborated at the July 1999 PrepCom, which was supposed to provide a solution for the situation in which the Presiding Judge does not issue directions under Article 64(8)(b). Other delegations, in particular the French, considered that no further guidance beyond Rule 140(1) was necessary to cover the gap in Article 64(8)(b) of the Statute.526 Lastly, the third group held the view that the lack of the basic framework in the Rules would not be problematic. The argument was that the innovative character of the institution and the special nature of any future cases demanded that the Court be given leeway in shaping the trial process and tailoring it to the needs in light of the experience, provided that the accused was provided with fair trial rights set forth in Article 67.527

In any event, from the early stage in the negotiations of the Rules, agreement was reached that Rule 140 should not favour any national legal tradition in particular.528 It was accepted that the Rule would provide some guidance but would also leave ‘ample room for maneuver for the Court, which will need to design its own approach and solutions within the parameters of the Rule’.529 As a result, the current wording of Rule 140(2), which emerged only at the fifth session of PrepCom, eschews the overt common law terminology of ‘examination-in-chief’, ‘cross-examination’ and ‘re-examination’.530 Instead, it employs a neutral and necessarily vague notion of ‘questioning’. It applies without distinction to questions asked by a party that ‘submits evidence by way of a witness’, by another party, and by the Chamber.531 The only area in which a common law approach appears to surface, is Rule 140(2)(c). It limits the Chamber’s questions to either before or after a witness is questioned by the prosecutor or the defence as a way to ‘prevent judges intervening in the cross-examination of a witness and thereby frustrat ing a party’s line of questioning’.532 This embodies a more adversarial approach to questioning, as in inquisitorial systems the bench is generally not constrained as to the subject-matter or timing of questions.

As a consequence of the use of culturally ‘neutral’ terminology, Rule 140(2) does not exhaustively deal with the order and modalities of the examination of evidence and leaves a number of important issues unaddressed. This requires that agreements be made by the parties or further directions rendered by the Court. First, it stipulates who may question witnesses but does not make clear when (in what order) the parties may do so.533 Some guidance as to timing is only provided in its subparagraph (c), which precludes judicial questioning in the course of the parties’ examination, and subparagraph (d), which entitles the defence to be the last in questioning the witness. The sequence of subparagraphs in sub-Rule 140(2) only gives an approximate idea about the actual order of questioning, as the modalities therein are not anchored to the presentation structure (e.g. ‘prosecution case’ and

525 Lewis, ‘Trial Procedure’ (n 519), at 548.
526 Ibid., at 549.
527 Ibid.
528 Ibid., at 548.
530 Lewis, ‘Trial Procedure’ (n 519), at 549-50.
531 Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 483), at 605 (‘cross-examination’, among others, is replaced by ‘more neutral terms – not always the most elegant ones – to avoid a language carrying too much baggage from one particular legal family’).
532 Lewis, ‘Trial Procedure’ (n 519), at 550 (the clause was added during the fifth PrepCom’s session in 2000).
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‘defence case’). Second, it is also unclear from Rule 140(2) whether the party examining the witness first is allowed to repeatedly question the same witness after he or she has been examined by the other party in accordance with Rule 140(2)(b). Whether ‘re-examination’ or its analogue is to be allowed depends on the role of judges in the questioning of witnesses pursuant to Rule 140(2)(c). If the witness has been extensively questioned by the Chamber after being questioned by the party other than the calling party, there may be no need for the fourth round of questioning. However, an extensive judicial questioning might raise further questions which the party calling the witness would wish to clarify through follow-up questioning. In addition, Rule 140(2)(d) that entitles the defence to be the last party to examine a witness, entails that ‘re-examination’ must necessarily be allowed for defence witnesses, whilst it is unclear whether this applies equally to the Prosecution.

Furthermore, there is an uncertainty in Rule 140(2) as to what the questioning by the calling party and the subsequent questioning by the other party entail and how exactly these modes of questioning correlate with essentially common law forms of examination practiced at the ad hoc tribunals. This includes the issue of what areas can be explored in different questioning rounds and how the questions are to be posed (for example, whether leading questions are allowed). Concerning subsequent questioning, Rule 140(2)(b) clarifies that the questions may address ‘relevant matters related to the witness’s testimony and its reliability, the credibility of the witness and other relevant matters’, without provision being made as to whether leading questions are permitted. Similarly, the purport, scope, and manner of judicial questioning and final questioning by the defence (Rule 140(2)(c) and (d)) remain undefined and are the matters the Court that have had to address through practice.

Furthermore, while the regulation of victims’ questioning is fragmented over different rules, Rule 140(2) fails to mention whether the victims participating in the proceedings may pose questions to the witnesses called by the parties, i.e. the prosecution and the defence. Rule 91(3)(a) provides that legal representatives of victims are entitled to question experts, accused, and witnesses, including those giving testimony by means of audio or video-link technology (Rule 67) or whose testimony was previously recorded (Rule 68). The legal representatives may conduct questioning in person or the Chamber may, if it considers it appropriate, put questions to the witness, expert, or accused on behalf of the legal representative. In any event, their questions must be authorized by the Trial Chamber, which will take into account ‘the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3’. The failure to address the matters related to

534 Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Deviser the Proceedings’ (n 478), at 506.
535 Ibid., at 506-7.
536 See Decision on Directions for the Conduct of the Proceedings, Prosecutor v. Bemba, ICC-01/05-01/08-1023, TC III, ICC, 19 November 2010 (‘Bemba trial directions’), para. 7 (‘The Chamber . . . will give the parties the opportunity to explore any news issues raised by the Chamber to the extent necessary’); Banda and Jerbo joint submissions (n 533), para. 12.
537 Fernández de Gurmendi and Friman, ‘The Rules of Procedure and Evidence’ (n 524), at 297 (the principle under Rule 140(2)(d), ‘the only remaining reference to a sequencing of questioning, was crucial to make the Rule acceptable to common law lawyers.’).
538 Gallmetzer, ‘The Trial Chamber’s Discretionary Power to Deviser the Proceedings’ (n 478), at 507.
539 Ibid., at 507 (in delimiting the scope and nature of its questions, the Trial Chamber will be guided by its mandate of the guarantor of procedural fairness under Art. 64(2) Statute).
540 Rule 91(3)(a) ICC RPE (‘When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.’)
541 Rule 91(3)(b) ICC RPE.
542 Ibid.
victims’ questioning in Rule 140(2) creates a gap regarding the timing of their questions. But Rule 91(3)(b) stipulates that the ruling on the legal representative’s request to pose questions ‘may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64’. Hence, the order and manner of questioning by legal representatives are left to the Chamber to determine on a case-by-case basis.

The features of the ICC legal framework concerning the order of submitting evidence to the Trial Chamber and the order and manner of questioning of witnesses, as discussed above, confirm that ‘neither common law nor civil law can be seen as the main reference point for establishing the law governing the procedure before the ICC’. This applies to both the language used and the normative content of the terminology, i.e. the specific understanding of the components of the proof-taking stage and modalities of examining evidence. The ICC Statute and Rules eschew the notions such as ‘examination-in-chief’, ‘cross-examination’, ‘rebuttal’ and ‘rejoinder’. But under the ICC’s variable trial model, this neither precludes recourse to this language and the procedural modes they denote in individual trials nor the interpretation of the neutral terminology along the lines typical for specific domestic procedural traditions.

One may speculate on what the average trial before the ICC can or should look like, taking its individual systemic features as departing points. In order to establish how the ICC trials are actually structured and in what order and under what terms the testimonial evidence is heard, the following sections explore the trial practice of the ICC in the handful of cases which have reached the trial stage thus far in the Situation in the DRC, Situation in the CAR, Situation in Darfur, and Situation in Kenya. The sections will examine the parties’ agreements and directions rendered by the Trial Chambers, in accordance with Article 64(8)(b) and Rule 140(1) of the ICC RPE. Given the still limited jurisprudence and the possibility for the Trial Chambers to depart from the previous trial practice in any future cases, this is not a definitive treatment. Any lessons, in the form of developed practices, are to be made on a broader experiential basis.

### 3.3.2 Order of presentation of evidence in practice

In the first ICC’s Lubanga case, no consolidated direction was issued by Trial Chamber I under Rule 140(1) in advance of the trial. Early in the trial, the Chamber solicited the views of the parties on a variety of matters, including the conduct of the proceedings and testimony. The parties made their submissions, and the Chamber acknowledged a ‘broad agreement’ between the parties on the manner in which evidence shall be submitted. This agreement, as supplemented by the Chamber’s numerous subsequent decisions has operates as the basic framework governing the trial. The agreement

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544 On the consultations under Art. 64(8)(b) ICC Statute, see Chapter 8.
545 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 (‘Lubanga OTP trial submissions’); Conclusions de la Défense sur des questions devant être tranchées à un stade précoce de la procédure…, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1033, Defence, ICC, 12 September 2007 (‘Lubanga witness testimony trial decision’).
546 Decision on the status before the Trial Chamber of the evidence heard before the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, Prosecutor v. Lubanga, ICC-01/04-01/06-1084, TC I, ICC, 13 December 2007, para. 2.
547 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 the admission of material from the “bar table”, Prosecutor v. Lubanga, Situation in the DRC, ICC-
embodied a division of the proof-taking phase into two cases. According to the OTP proposal, not objected to by the defence and not modified by the Chamber, it was to present all its evidence at the beginning of the trial. The OTP explained that the complete picture of such evidence would enable the accused to decide whether to exercise his procedural rights under Article 67(1)(g) and (i), i.e. the right to silence and non-reversal of the burden of proof. The prosecution argued that it was well-placed, by virtue of its familiarity with the witnesses and other evidence it intended to lead, to present its evidence and effectively organize its case; the proposed approach would therefore promote the expeditious administration of justice. The prosecution evidence was to be followed by the defence evidence, in case the accused decided to rebut the incriminating evidence. Notably, later in the trial, the Trial Chamber refrained from stating that ‘as a matter of general policy, no additional incriminating evidence is to be permitted following the close of the “prosecution case”’, which contrasts with the ICTY’s pronouncements in that regard. The prosecution also proposed to provide, on a case-by-case basis and subject to conditions established by the Chamber, for the presentation of prosecution evidence in rebuttal and defence evidence in rejoinder. This would be the way for the Chamber to be seized with all relevant evidence, in keeping with Article 69(3). The defence objected to this proposal and submitted that in contrast with the ad hoc tribunals’ procedural regime, neither the ICC Statute nor the Rules authorized the prosecution response to the defence evidence qua rebuttal. This disagreement was settled by the Chamber towards the end of the trial when it held that although the Statute does not expressly envisage a rebuttal stage, it is sufficiently broadly framed to allow this kind of evidence to be introduced.

The initial inter partes agreement in Lubanga was incomplete with regard to evidence other than that submitted by the parties, namely the Chamber’s evidence and evidence called by the victims’ legal representatives. The obvious consequence of the previously mentioned decision of 18 January 2008 (upheld by the Appeals Chamber) to allow victims to introduce evidence on the guilt or innocence at trial was that the order of evidence agreed upon by the parties would be subject to modification accommodating victims’ evidence within the sequence of case presentation. While that decision provided no guidance with respect to the timing of victims’ evidence, this was addressed in the later decision on the request of the legal representative of victims to allow three victims (out of 94 participating victims in the case) to participate in person by presenting their views and concerns and by giving testimony under oath. Over the objections by both parties, and having noted the need to ensure that the personal participation by victims would not have

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548 Lubanga OTP trial submissions (n 545), para. 30; Lubanga defence trial submissions (n 545), para. 45 (‘La Défense s’associe aux observations présentées par le Procureur aux paragraphes 28 et suivants de ses Conclusions, à l’exception de la demande du Procureur d’être autorisé à présenter «des moyens en répliques après la présentation des éléments de preuve de la Défense.»’ Footnote omitted.)

549 Lubanga OTP trial submissions (n 545), para. 30 and n79.

550 Ibid., para. 30.

551 Lubanga trial decision of 29 April 2010 (n 475), para. 26. See supra n 86.

552 Ibid., para. 31.

553 Lubanga defence trial submissions (n 545), para. 46 (‘En effet, à la différence des Statuts et des Règlements des Tribunaux ad hoc, ni le Statut ni le Règlement de procédure et de preuve de la CPI ne prévoient que l’Accusation soit autorisée à répliquer aux moyens de preuve de la Défense par la présentation de moyens de preuve en réplique.’ – Footnote omitted.)

554 Lubanga rebuttal decision (n 475), paras 37-38 (citing Arts 64(6)(b), (d), and (I), (9)(a), and 69(3) and (4) ICC Statute).

555 See supra 3.3.1.B.

556 Decision on the request by victims a/0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2032-Anx, TC I, ICC, 26 June 2009, paras 1 and 4.
negative impact on the trial, the Trial Chamber permitted them to give testimony and, if after they did so, to decide whether they still wished to present their ‘views and concerns’. The Chamber also distinguished between these two participatory modalities (‘views and concerns’ and testimony): whilst the former is equivalent to presenting submissions that might assist the Chamber in its approach to the evidence but do not form the part thereof, the latter contributes to evidentiary record and may only be given by victims under oath from the witness box. Whether the victims are to express their views and concerns, in person or through a legal representative, or to give evidence, or both, must be carefully considered in order to ensure that there is no repetition. This consideration is fact-specific and ought to take into account the circumstances of the trial as a whole. The Chamber reserved for the victims’ evidence the slot ‘after the judicial recess, but in any event prior to the accused’s presentation of his case’. Similarly, it was not made clear from the outset when the evidence called by the Chamber proprio motu or upon request of legal representatives—in case they wish to call witnesses other than their clients—was to be heard. Normally, given the structure of proof-taking phase adopted, the Chamber would be expected to call its own witnesses proprio motu in the last turn, after all other witnesses called by the parties and participants have been heard. It is at that stage that it would be equipped to determine whether calling any additional Chamber witnesses would be necessary in order to ascertain the truth. In practice, the Chamber decided to call two Chamber expert witnesses after prosecution witnesses and before the evidence called by legal representatives. Furthermore, in its ruling on potential Chamber witnesses, the Lubanga Chamber held that it ‘will only consider calling the witness if in due course it considers this step is necessary, pursuant to Article 64(6)(b) of the Statute’. Eventually, after the parties presented their cases, the Chamber exercised its authority under Articles 64(6)(b) and 69(3) and called as a ‘chamber witness’ the witness proposed by the OTP in rebuttal to testify on the relation between the Hema self-defence groups and the UPC and other relevant matters. In total the Chamber called four expert witnesses.

As noted, the Lubanga Chamber held that the Statute does not preclude the Chamber from ‘allow[ing] evidence in circumstances sometimes described as “rebuttal evidence”’. It deemed the ICTY and ICTR case law on rebuttal relevant and endorsed the ad hoc tribunals’ interpretations. It ruled that ‘calling rebuttal evidence is likely to be an exceptional event’ and that the prosecution must demonstrate ‘first, that an issue of significance has

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557 Ibid., paras 39-40 (‘these applicants have each demonstrated that the evidence they seek to present affects their personal interests and, in each instance, it is directly related to the charges brought against the accused. Therefore, they may give evidence. … Once the three participating victims have completed their evidence, they will be in the best position, at that stage, to determine whether they wish to express their views and concerns personally.’).

558 Ibid., para. 25.

559 Ibid., paras 26-7. The TC emphasized that ‘the legal representatives have a crucial role to play’ in this matter, because ‘it is of undoubted importance that the participating victims receive careful and comprehensive advice as to the most appropriate form of participation’. Ibid., para. 40.

560 Ibid., para. 44.


563 Lubanga rebuttal decision (n 475), paras 62-5.

564 Lubanga trial judgment (n 505), para. 11.

565 Lubanga rebuttal decision (n 475), paras. 41.
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arisen *ex improviso*; second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused’s rights’. 566

As a result of these decisions, the *Lubanga* trial unfolded in the following order: (i) evidence submitted by the prosecutor; (ii) the Chamber’s evidence; (iii) evidence submitted by the participating victims in person; (iv) evidence submitted by the defence; (v) rebuttal; and (vi) the Chamber’s evidence. The several instances on which the Chamber called witnesses and the evidentiary context in which it decided to do so indicate that the Chamber did not consider itself limited in the exercise of its powers under Articles 64(6)(b) and (d) and 69(3) to any specific slots within the proof-taking sequence. This power may be invoked extra-sequentially whenever the Chamber deems it necessary to establish the truth.

In the second *Katanga and Ngudjolo Chui* trial, Trial Chamber II chose to issue the consolidated directions on the conduct of the proceedings in advance of the trial. 567 It ruled that the hearings would be organized in distinct phases (per party), with the caveat that the Chamber would be empowered to intervene at all times and to order the production of all evidence necessary for the determination of the truth in keeping with Articles 64(6)(d) and 69(3). 568 The noteworthy aspect of Trial Chamber II’s directions is the language employed to denote the alternating phases of the trial or its evidentiary blocks. Whereas in *Lubanga*, neither the *inter partes* agreement nor the supplementary decisions refer to them as ‘prosecution case’ or ‘defence case’, the *Katanga and Ngudjolo* Chamber composed of judges from a civil law background, did not eschew the express common law terminology. The first phase of the proof-taking stage is the presentation by the prosecution of its case against the accused (‘Prosecution case’). 569 In line with the *Lubanga* approach, the *Katanga and Ngudjolo* directions stipulated that after the prosecution concludes its case, participating victims wishing to testify in person may request the Chamber for leave to do so. 570 The decision to allow victims to testify after the prosecution case is explained by the fact that the evidence provided by the victims would be about the crimes with which the accused persons were charged, and therefore the co-accused should present their cases only once all witnesses against them, including the victim-witnesses, have testified. 571

The way in which the presentation of the ‘evidence of victims’ was justified (as the evidence called by the Chamber at the victims’ request under Article 69(3)) is consistent with the reasoning developed by the *Lubanga* Trial Chamber. Trial Chamber II would only allow the legal representatives to call one or more of their clients to testify in person if their proposed testimony ‘can make a genuine contribution to the ascertainment of the truth’. 572 Whilst it did not explicitly distinguish between ‘views and concerns’ and testimony, the Chamber observed that the *request* to allow testimony made under Article 69(3) is the way of expressing the ‘views and concerns’. 573 In the request, the legal representative would be expected to explain the relevance of the proposed testimony of the victim to the issues in the case and illustrate its supposed contribution to the establishment of the truth. 574 The relevant considerations for the Chamber include whether: (a) ‘the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties’; (b) the topic

566 *Ibid.*, paras 42-3. However, the evidence proposed by the prosecutor was not admitted as ‘rebuttal evidence’ because it was not deemed to have arisen *ex improviso* in spite of some novel elements: *Ibid.*, paras 56-7.

567 Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Prosecutor v. Katanga and Ngudjolo, Situation in the DRC*, ICC-01/04-01/07-1665, TC II, ICC, 20 November 2009 (‘Katanga and Ngudjolo Chui trial directions’), para. 3.


571 *Katanga and Ngudjolo* victim participation trial decision (n 485), para. 86.

572 *Katanga and Ngudjolo Chui* trial directions (567), para. 20.

573 *Katanga and Ngudjolo* victim participation trial decision (n 485), para. 82.

574 *Katanga and Ngudjolo* trial directions (567), para. 30.
on which the victim proposes to testify is sufficiently closely related to issues raised by the charges before the Chamber; (c) the proposed testimony is ‘typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter’; and (d) ‘the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges’.575

The testimony of the victims may be allowed only upon a written application by the legal representative, to be filed prior to the conclusion of the prosecution case.576 The Chamber’s overriding concern is that the victim’s testimony must take place in an expeditious manner not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.577 More specific limitations to the possibility for the victims to testify are that this participation must not: (a) infringe the right of the accused to be tried without undue delay as per Article 67(1)(c); (b) effectively amount to auxiliary prosecution; and (c) consist in an anonymous testimony vis-à-vis the defence.578 When the application is granted, the victims’ testimony may not come as an ‘unfair surprise’ to the defence, and it is entitled to an adequate time for preparation.579 To that end, the legal representative’s application must be accompanied by a signed statement by the victim, containing a comprehensive summary of the proposed testimony, which shall count as disclosure under Regulation 54(f) in case the application is granted.580

The second phase in the Katanga and Ngudjolo trial was the presentation of the evidence by the defence for both accused (‘Case for the Defence’), the order of cases being the case for Katanga first and for Ngudjolo Chui second.581 The defence case was to be followed by the testimony of further witnesses called by the Chamber.582 The reasons for the sequencing whereby the Chamber’s evidence comes last are self-evident. The witnesses called by the Chamber proprio motu or upon request of the legal representatives should as far as possible appear at the conclusion of the presentation of the parties’ cases, because ‘[o]nly after such presentation will the Chamber be able to make a fully informed assessment of the interest and relevance of those witnesses’.583 In contrast with the Lubanga trial, Trial Chamber II from the outset indicated the allocation of evidence other than that submitted by the parties in the sequence of proof-taking. For that purpose, it distinguished between, on the one hand, the evidence submitted by the legal representatives by way of participating victims’ testimony, to be heard in the first phase of trial and, on the other hand,

575 Ibid.
576 Ibid., para. 25; Katanga and Ngudjolo victim participation trial decision (n 485), para. 87.
577 Katanga and Ngudjolo trial directions (n 567), para. 21.
578 Ibid., para. 22. Reaffirming the third prong, see Katanga and Ngudjolo victim participation trial decision (n 485), para. 92.
579 Katanga and Ngudjolo trial directions (n 567), para. 23.
580 Ibid., para. 26. The legal representatives were urged to avoid redactions in the statement other than those necessary to protect the safety, physical, or psychological well-being of the victims or third persons; any redactions must be authorized by the TC (ibid., para. 27). Both the application and the summary shall be notified to the parties who will have seven days to make observations (ibid., para. 28).
581 Ibid., para. 6. See also Order determining the mode and order of examination for the witnesses called by the Defence teams (regulations 43 and 54 of the Regulations of the Court), Katanga and Ngudjolo, Situation in DRC, ICC-01/04-01/07-2775-tENG, TC II, ICC, 15 March 2011 (‘Katanga and Ngudjolo defence calling order’), paras 15, 16, 21, and 24 (holding, however, that ‘in the case of three common witnesses, the Defence team for Mathieu Ngudjolo should, to a certain extent, benefit from the examination-in-chief of German Katanga’s Defence team’, allocating the second team 20% of the time for examination-in-chief of those witnesses, and ordering them to conduct it immediately after the examination by the first team).
582 Katanga and Ngudjolo trial directions (n 567), para. 7.
583 Katanga and Ngudjolo victim participation trial decision (n 485), para. 95. The TC denied requests to call additional witnesses and did not summon any additional witnesses propre motu; see Order on the arrangements for the submission of the written and oral closing statements (regulation 54 of the Regulations of the Court), Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-3218-tENG, TC II, ICC, 15 December 2011, para. 4.
the evidence called by the Chamber at the end of the trial after the defence teams have closed their respective cases, including any non-victim-witnesses suggested by the legal representatives.\textsuperscript{584}

Trial Chamber II did not envisage a rebuttal stage in its directions, but a later oral decision clarified that rebuttal may be permitted in exceptional circumstances on matters, which could not be dealt with sufficiently during the witness evidence through questioning or objections.\textsuperscript{585} The prosecutor was required to apply for leave to submit additional evidence addressing any ‘new circumstances’, while ‘the mere fact that a Prosecutor could not foresee a given Defence question does not, in itself, constitute an exceptional circumstance’.\textsuperscript{586} The Chamber’s understanding was that ‘in this exercise, the Defence is going to have the final word’,\textsuperscript{587} which implies the possible rejoinder.

The \textit{Katanga and Ngudjolo} directions did not indicate whether the Chamber intended to impose on a party a specific choice of which witnesses to call or the order of calling witnesses. However, it ruled that, subject to its authority to determine the mode and order of questioning of witnesses and presenting evidence, it is incumbent on each party to inform the Chamber as well as the other parties/participants of the exact order of witnesses due to testify and the scheduled date of their appearance.\textsuperscript{588} This would enable the other party to adequately prepare.\textsuperscript{589} The \textit{Katanga and Ngudjolo} Chamber also gave an early indication of its intention to closely monitor the progress of the proceedings and to ensure that the projected length of each phase is strictly complied with by the parties/participants; it might allow overrunning the amount of time allotted only in exceptional circumstances.\textsuperscript{590} The trial directions imposed time limits on the presentation of the prosecution case, and the Chamber subsequently issued a separate ruling allocating time to the defence teams for the presentation of their cases and approving in part their proposals regarding the order of appearance.\textsuperscript{591}

In the third ICC’s trial in the \textit{Bemba} case (\textit{Situation in the CAR}), Trial Chamber III followed the approach of the \textit{Katanga and Ngudjolo} Chamber in rendering the consolidated—albeit less detailed—directions for the conduct of the trial pursuant to Rule 140.\textsuperscript{592} When defining the sequence of the trial, the \textit{Bemba} Chamber chose not to depart from the practice before other Chambers:

\begin{quote}
the trial will commence with the presentation of the prosecution evidence, followed by the presentation of the defence’s evidence, should it elect to present such evidence. At the end of the presentation of the parties’ evidence, the Chamber may decide to call additional witnesses. Victims suggested to be called by the legal representatives shall testify before the
\end{quote}

\textsuperscript{584} \textit{Ibid.}, para. 85; \textit{Katanga and Ngudjolo} trial directions (n 567), para. 7.
\textsuperscript{586} \textit{Ibid.}, at 77.
\textsuperscript{587} \textit{Ibid.}
\textsuperscript{588} \textit{Katanga and Ngudjolo} trial directions (n 567), para. 8-9 (the schedule is to be updated at the end of each week and should provide the exact planning for the coming two weeks; any last minute changes to the schedule or the calling order are to be notified as early as possible).
\textsuperscript{589} See further Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol, \textit{Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC}, ICC-01/04-01/07-956, TC II, 13 March 2009, para. 6 (‘although the Prosecution rightly asserts a great level of discretion in choosing which evidence to introduce at trial, the Defence must be placed in a position to adequately prepare its response, select counter-evidence or challenge the relevance, admissibility and/or authenticity of the incriminating evidence’).
\textsuperscript{590} \textit{Katanga and Ngudjolo} trial directions (n 567), paras 10-11.
\textsuperscript{591} \textit{Ibid.}, paras 8–9 (allocating 120 hours in total for the prosecution examination-in-chief of its 26 witnesses (four and a half hours per witness) and roughly 60% of that time for each defence team’s cross-examination); \textit{Katanga and Ngudjolo} defence calling order (n 581), paras 14, 18 (allocating 150 hours—85 hours to the \textit{Katanga} team and 65 hours to the \textit{Ngudjolo} team—for presentation of the defence cases, i.e. four hours per witness, and allotting the prosecution 120 hours for cross-examination).
\textsuperscript{592} \textit{Bemba} trial directions (n 536).
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commencement of the presentation of the defence evidence.\(^{593}\) Further, the Chamber may intervene at any given time, inter alia, to order the production of such new evidence as it considers necessary for the determination of the truth, in accordance with Articles 64(6)(d) and 69(3) of the Statute.\(^{594}\)

The Bemba directions did not directly address the issue of the permissibility of, and the preconditions for, leading evidence in rebuttal. In light of the practice before other Chambers, it may not be excluded that the Bemba Chamber would allow rebuttal in due course in appropriate circumstances and in line with the criteria relied upon in previous cases. It also envisaged the possibility of calling additional (Chamber) witnesses ‘at the end of the presentation of the parties’ evidence’ or order the production of additional evidence that it considered necessary for the determination of the truth ‘at any given time’.\(^{595}\) Arguably, this does not preclude the Chamber to allow the presentation of ‘rebuttal evidence’. The Bemba Chamber also rejected the defence’s argument that it should be allowed the right to be the last to present evidence, after the additional witnesses possibly to be called by the Chamber, as having no basis in the Statute.\(^{596}\) At the same time, it held that, subject to the showing of ‘any specific and concrete prejudice requiring the submission of further evidence essential to the Chamber’s determination of the truth, after hearing the evidence heard by the Chamber and before the Chamber declares the submission of evidence to be closed pursuant to Rule 141(1)’, it might sustain the defence’s substantiated motion for the presentation of further evidence.\(^{597}\) Hence, the analogue of defence rejoinder was not ruled out.

At the time of the issuance of the trial directions, Trial Chamber III has already approved the revised order of appearance of prosecution witnesses.\(^{598}\) It refrained from setting any time limits on either case for the parties, reserving the right to issue further decisions to that effect; subsequently, a number of time-management decisions were issued.\(^{599}\) It appears thus that the Trial Chamber’s initial attitude was less ‘managerial’ than that of the Katanga and Ngudjolo Chamber, as it granted the parties greater autonomy in developing their cases. It granted the defence the time it requested for the questioning of its witnesses (230 hours), which it found ‘appropriate and reasonable’, and did not reduce the number of witnesses (but ‘instruct[ed] the defence to review its list in order to determine

\(^{593}\) As a distinct participation modality, the victims have an opportunity to present ‘views and concerns’, next to the presentation of evidence. In the Bemba trial, two victims were permitted to present evidence and three their views and concerns (via video-link technology); see Bemba trial decision on victim evidence (n 485); Decision on the presentation of views and concerns by victims a/0542/08, a/0394/08 and a/0511/08, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2220, TC III, ICC, 24 May 2012, para. 13(a).

\(^{594}\) Bemba trial directions (n 536), para. 5.

\(^{595}\) Ibid., para. 7.

\(^{596}\) Decision on the Motion for clarification and reconsideration of the timetable for the parties’ final submissions of evidence, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2855, TC III, ICC, 30 October 2013, paras 14-6 (‘the Court’s legal framework does not grant the accused the right to be the last to present evidence. The only two provisions relied upon by the defence in its Motion, Rules 140(2)(d) and 141(2) of the Rules, do not grant the accused the right to be the last to present evidence. Consequently, the defence has no statutory right to call evidence after the presentation of the Chamber’s evidence or to expect the Chamber to decide on the admissibility of all evidence before the end of the defence’s presentation of evidence.’).

\(^{597}\) Ibid., para. 17.

\(^{598}\) Order on the ‘Prosecution’s Revised Order of its Witnesses at Trial and Estimated Length of Questioning’, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-996, TC III, ICC, 4 November 2010, para. 3.

\(^{599}\) Ibid., para. 4; Bemba trial directions (n 536), para. 6. For such further decisions, see Order on the procedure relating to the submission of evidence, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-1470, TC III, 31 May 2011; Public Redacted Version of the Chamber’s 11 November 2011; Decision regarding the prosecution’s witness schedule, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-1904-Red, TC III, ICC, 15 November 2011; Decision on defence disclosure and related issues, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2141, TC III, ICC, 24 February 2012 (imposing on the defence stringent disclosure requirements prior to the presentation of its case);
whether there is any room for reducing the number of witnesses and avoiding the presentation of overly repetitive evidence as well as to adjust the order of appearance for logistical reasons. Ultimately, in the course of the defence phase, the Chamber adopted a more hands-on approach in order to prevent further delays. In relation to the structure of each case and the order of appearance, the Trial Chamber held that ‘it is for the parties to determine the manner in which they will present their cases’, although this discretion is not unlimited but subject to the Chamber’s statutory duties to ensure a fair and expeditious trial and to guarantee full respect to the rights of the accused. The Chamber would only interfere with a party’s decisions regarding selection and presentation of evidence if there is a compelling reason: ‘This measure of deference permits the parties to shape their presentation of evidence in a manner that best fits their overall theory of the case.’

In the Banda and Jerbo trial (Situation in Darfur), the sequence of presenting evidence is essentially to be governed by the parties’ joint submissions filed upon Trial Chamber IV’s invitation. In relation to those submissions, the Chamber was ‘the procedures proposed in the Joint Submission will additionally shorten the length of the trial preparation as well as “expedite the proceedings”’. In that trial, the avenue of letting the parties reach the agreement was chosen rather than handing down a direction from the outset. This was due to the agreement on the facts between the parties, which in the Chamber’s view might ‘significantly affect the procedures to be adopted to facilitate the fair and expeditious conduct of the proceedings, including the disclosure process and the presentation of evidence.’ The procedures proposed by the parties largely drew upon the previous trial practice of the Court and were not set out exhaustively in the joint

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607 See Decision on the “Submissions on Defence Evidence”, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2225, TC III, ICC, 7 June 2012, paras 10–17 (‘given that the defence is the best placed to know how to best shape its case and that the estimated time of its questioning does not exceed the time used by the prosecution, the Chamber considers that the time requested by the defence for the questioning of its witnesses is appropriate and reasonable’).

603 See e.g. Decision on the timeline for the completion of the defence’s presentation of evidence and issues related to the closing of the case, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2731, TC III, ICC, 16 July 2013; Decision on the time limit for the conclusion of the defence’s presentation of oral evidence at trial, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2861, TC III, ICC, 1 November 2013; Public redacted version of “Second decision on issues related to the closing of the case”, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-2837-Red, TC III, ICC, 18 October 2013.

604 Decision regarding the prosecution’s witness schedule, Prosecutor v. Bemba (n 599), para. 24 (referring to Arts 64(2) and (8)(b), and 67(1)(c) ICC Statute and Regulation 43 ICC Regulations of the Court); Decision on the “Submissions on Defence Evidence”, Prosecutor v. Bemba (n 600), para. 6.

605 Order requesting submissions on procedures to facilitate the fair and expeditious conduct of the proceedings following the Joint Submission of 16 May 2011, Prosecutor v. Banda and Jerbo, Situation in Darfur, ICC-02/05-03/09-155, TC IV, ICC, 30 May 2011 (‘Banda and Jerbo order requesting submissions on procedures’), para. 7; Joint Submissions by the Office of the Prosecutor and the Defence regarding the Procedures to be adopted for the Presentation of Evidence, Prosecutor v. Banda and Jerbo, ICC-02/05-03/09-166, OTP and Defence, ICC, 27 June 2011 (‘Banda and Jerbo joint submissions’). As of the timing of writing, the Banda trial is scheduled to commence on 5 May 2014: Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, Prosecutor v. Banda and Jerbo, Situation in Darfur, ICC-02/05-03/09-455, TC IV, ICC, 6 March 2013, para. 25.

606 Decision Public on the Joint Submission regarding facts, Prosecutor v. Banda and Jerbo, Situation in Darfur, ICC-02/05-03/09-227, TC IV, ICC, 28 September 2011, paras 24-5 (considering that the agreement on facts ‘has the procedural effect of narrowing the scope of the issues to be addressed by the parties (and the participants) at trial.’).


608 Banda and Jerbo order requesting submissions on procedures (n 604), para. 3. Cf. Banda and Jerbo joint submissions (n 604), para. 2 (noting that the ‘narrowing [to a very significant extent the issues in dispute between them] should not significantly affect the procedures to be adopted for the presentation of evidence during the merits phase of proceedings’ in relation to contested issues).
submissions, which presupposed the need for the Chamber to issue further decisions. The proposed order in the fourth trial was as follows: (i) the presentation by the prosecutor of all incriminating evidence at the beginning of the trial ('Prosecution case'); (ii) subject to the Chamber’s leave in keeping with the procedure to be adopted in a due course, the presentation of evidence by any participating victims who wish to testify in person; and (iii) should it elect to present any evidence, the defence presentation. The parties to this trial have been forthcoming in actively facilitating the Trial Chamber’s management of the proceedings. It was suggested that the parties and legal representatives should notify the Chamber as well as the other party and/or participants of the anticipated order of witnesses due to testify and the corresponding dates and length of testimony two or, if possible, four weeks in advance of the commencement of the case. The joint submissions did not directly deal with the possible right of the prosecution to present rebuttal evidence or defence rejoinder on the contested issues, but the Chamber can be expected to rule on this issue when and if it arises.

Finally, in Ruto and Sang trial (Situation in the Republic of Kenya), Trial Chamber V chose the approach of issuing several consolidated decisions handing down the general directions covering main issues of conduct of the proceedings and testimony, including directions on the order and manner in which evidence shall be submitted in accordance with Rule 140. Like in the previous cases, the decisions reflect the division into two principal phases ('prosecution case' and 'defence case'), with the possibility for the victims to lead evidence subject a distinct application and the Chamber’s leave. Among other matters, the bulk of the directions was devoted to determining the duration of prosecution case and the number of prosecution witnesses as well as scheduling issues. However, since the decisions do not shed light on the general order of the presentation of evidence, such as when the evidence called by the Chamber or by the legal representatives is to be called or whether the rebuttal (and rejoinder) rounds will be allowed, the Chamber may be expected to clarify these matters in a due course.

It remains to provide a synthesis of the approaches adopted by various ICC Trial Chambers in structuring the phase for the presentation of evidence in the trial proceedings conducted thus far. Despite notable terminological differences between the Chambers in referring to the various phases of proof-taking at trial and in devising the trial proceedings pursuant to Rule 140, it can be concluded that the ICC trial practice has acquired a significant degree of consolidation and that the general contours of the sequencing of an average ICC trial have become clear. In broad terms, the ICC trials have followed this order: (i) evidence for the prosecution (prosecution case); (ii) victim-witnesses testifying in person; (iii) evidence for the defence (defence case); (iv) possibly, prosecution rebuttal (and defence rejoinder); and (v) the Chamber witnesses. With respect to the Chamber witnesses, the practice has varied and the Chamber is not limited to calling them at specific phase of the

608 Banda and Jerbo joint submissions (n 604), paras 3-4 and 9 (the modalities of the participation of legal representatives of the victims being an issue in need of separate regulation).
609 Ibid., para. 9.
610 Ibid., para. 11 (adding the requirements that the first schedule be updated on a weekly basis, the anticipated planning be notified on a monthly basis, and any changes to the schedule or the calling order be communicated to the Chamber, the other party, and participants as early as possible).
612 Ruto and Sang general directions (n 611), paras 9-10 (considering 413 hours for the examination-in-chief of 46 witnesses proposed by the OTP to be excessive); Ruto and Sang general directions no. 2 (n 611), paras 21-7 (granting to the OTP 588 hours to complete its case).
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process. Chamber witnesses may be examined prior to the victims’ testimony or after the parties rest their cases. The ICC Trial Chambers have not deemed their power to call evidence as restricted to any particular slot in the evidentiary process. Instead, they consider themselves empowered to call witnesses whenever doing so would promote the truth-finding objective in the particular case. The other remarkable feature is that the Chambers have been consistent in considering the evidence for the prosecution and evidence for the defence as the two phases of the trial \textit{par excellence}. However, the ‘blocks of the Chambers’ and legal representatives’ evidence are optional and variable.\footnote{E.g. \textit{Katanga and Ngudjolo} trial directions (n 567), section B (entitled ‘Possibility for the victims to testify’, as opposed to sections A and C (‘Case for the Prosecution’ and ‘Case for the Defence’ respectively)).} This reflects the notion that parties may present evidence as of right and will normally be the main providers of evidence at trial, in accordance with Article 69(3) of the Statute.

3.3.3 Order of examining witnesses in practice

The general principles governing the order of examination of witnesses at trial are set out in Rule 140(2) that was discussed above.\footnote{See supra 3.3.1.A.} Given that this aspect of the ICC trial practice is relatively uniform, the section will outline the basic contours of the approach towards sequencing the testimony of the witness adopted by different Chambers. As with other aspects of trial process, different approaches were adopted by different Chambers to devising the regime on the sequence of examining witnesses. In \textit{Lubanga}, the guidelines were handed by the Chamber in a piecemeal fashion and on many issues acknowledged the agreements between the parties.\footnote{\textit{Lubanga} Rule 140 oral trial decision (n 547), at 35-8; \textit{Lubanga} witness testimony trial decision (n 547), para. 31 (clarifying that the purpose of the decision is ‘to provide the parties and participants with general guidelines on the main matters related to the testimony of witnesses during trial’. Emphasis added.)} By contrast, the \textit{Katanga and Ngudjolo} Trial Chamber issued a consolidated and very detailed decision which specified the sequence of examination for each block of evidence.\footnote{\textit{Katanga and Ngudjolo Chui} trial directions (n 567), paras 15-8; 31-48.} Similarly, the \textit{Ruto and Sang} directions set out the principles governing the questioning order in general terms.\footnote{\textit{Ruto and Sang} general directions (n 611), paras 15-21.} The exact order in which the trial actors take turn in examining a witness varies depending on the evidentiary phase of the trial, i.e. on who—the prosecution, the defence, the Chamber, or the legal representative—has called the particular witness.

During the prosecution phase, (i) the prosecution is the first to examine the witness in chief (or to conduct first questioning); (ii) following which the legal representatives may pose questions to the witness, subject to the Chamber’s granting of a written application (Rule 91(3) ICC RPE);\footnote{\textit{Katanga and Ngudjolo} trial directions (n 567), para. 18; \textit{Katanga and Ngudjolo} victim participation trial decision (n 485), para. 77.} (iii) the defence team(s) will then conduct the cross-examination (secondary examination); (iv) upon that the prosecution may re-examine in relation to matters raised during cross-examination to ensure that evidence is presented in a complete and fair fashion;\footnote{\textit{Lubanga} Rule 140 oral trial decision (n 547), at 35-8; \textit{Katanga and Ngudjolo Chui} trial directions (n 567), paras 15-8; \textit{Bemba} trial directions (n 536), paras 8–9, 19; \textit{Banda and Jerbo} joint submissions (n 604), paras 14-5.} and, (v) finally, the defence may question the witness last in accordance with Rule 140(2)(d) on the newly arisen matters.\footnote{\textit{Lubanga} Rule 140 oral trial decision (n 547), at 37; \textit{Katanga and Ngudjolo Chui} trial directions (n 567), para. 14.} The Trial Chamber may pose questions whenever the judges consider it appropriate, whilst ensuring that the right of the accused to question last and that ‘the parties generally have the opportunity to explore any new issues to the extent that is necessary’.\footnote{‘the prerogative of the Chamber to ask questions of whichever witness at any time’.)}
Where a victim has been granted permission to testify, after he or she is sworn in, the legal representative will be the first to question him or her (examination-in-chief), followed by other legal representatives, subject to the Chamber’s permission; the prosecution and the defence will then conduct their questioning pursuant to Rule 140(2)(b), in this order.\(^{622}\) In *Lubanga*, the Trial Chamber wished to do away with the opportunity for the legal representative to re-examine victim-witnesses in order to obviate the need for final questioning by the defence under Rule 140(2)(d).\(^{623}\) This does not exclude, however, the addition of steps such as the repeated questioning (re-examination) by the legal representatives; further questioning by the prosecution; final questioning by the defence. Moreover, the Chamber may pose questions to testifying victims in between the examination by the parties and participants\(^{624}\) and intervene at any time when necessary in order to facilitate the questioning.\(^{625}\) Questioning of testifying victims is normally to be conducted in a neutral manner and not to replicate ‘cross-examination’, although the Chamber may authorize parties to conduct it on a case-by-case basis.\(^{626}\)

The questioning of witnesses during the ‘defence phase’ is sequenced as follows: (i) first questioning (examination-in-chief) by the defence team calling the witness and questioning by the other defence team, if any; (ii) prosecution cross-examination; (iii) the questioning by the victims’ legal representatives, subject to the Chamber’s authorization given upon a written application;\(^ {627}\) and (iv) re-examination (repeated questioning) by the defence, whereby the defence team that has called the witness will be entitled to question the witness last (with the possibility of sharing this task among teams or delegating it to one of them).\(^ {628}\) This means that the prosecution would normally not be allowed to ‘re-cross-examine’ defence witnesses, lest the defence would be allowed another opportunity to examine the witness to comply with the terms of Rule 140(2)(d).\(^ {629}\) As with other witnesses, the Chamber is authorized to put questions to defence witnesses before or after the examination by parties and participants, in addition to directing their questioning for the purpose of clarification and assistance in eliciting evidence. In trials involving more than one accused, defence teams must coordinate amongst themselves regarding the call of joint witnesses: if they wish to call the same witness, the Chamber will not, save for exceptional circumstances, allow doing so more than once.\(^ {630}\) When calling a joint witness, the defence teams are expected to agree on the organization of examination-in-chief by splitting the time

\(^{622}\) *Katanga and Ngudjolo* trial directions (n 567), paras 31-2; *Banda and Jerbo* joint submissions (n 604), para. 18. See also Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-226-Red-ENG, TC I, ICC, 13 January 2010, at 64-5 (‘our preliminary view is that, with participating victims, there should be essentially three instances of examination: first by the victims, second by the Prosecution, third by the Defence.’); Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-227-Red-ENG, 14 January 2010; Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-228-Red-ENG, TC I, ICC, 15 January 2010.

\(^{623}\) *Lubanga* transcript, 13 January 2010 (n 622), at 64 (‘if re-examination is allowed by the representative of participating victims, there is then the possibility of yet further examination by the Defence because of the regulatory entitlement of the Defence always to ask questions last. And we are of the view that, unless there are exceptional circumstances which dictate a different course, that it is more in the interest of the witness not to be burdened by yet further questions arising out of his testimony. Now, we won’t finally conclude the issue now.’).


\(^{625}\) E.g. *Lubanga* transcript, 14 January 2010 (n 622), at 45-6.

\(^{626}\) *Katanga and Ngudjolo* trial directions (n 567), para. 32.

\(^{627}\) See in particular *Katanga and Ngudjolo* victim participation trial decision (n 485), para. 77; *Katanga and Ngudjolo* trial directions (n 567), paras 37 and 42.

\(^{628}\) *Katanga and Ngudjolo* trial directions (n 567), paras 33-42; *Bemba* trial directions (n 536), para. 11; *Banda and Jerbo* joint submissions (n 604), paras 14-5. See e.g. Transcript, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-T-240-Red-ENG, TC I, ICC, 8 February 2010.

\(^{629}\) See e.g. *Lubanga* Rule 140 oral trial decision (n 547), at 37 (omitting this issue).

\(^{630}\) *Katanga and Ngudjolo* trial directions (n 567), paras 64-5.
amongst themselves or by delegating it to one team. The defence witness other than a joint witness may be examined by the counsel for the co-accused on matters raised since the non-calling defence team’s first round of examination and pertaining to its own case. Such questioning may amount to cross-examination where the witness has not been examined-in-chief on behalf of the respective accused.

Finally, on the order of examination of the Chamber’s witnesses, different approaches have developed depending on what actor requested a specific witness to be called. In Lubanga, the Trial Chamber ruled that the witness it had called, initially proposed as the Prosecution’s rebuttal witness, would be questioned by the parties and participants in the order usual for prosecution witnesses. Similarly, it allowed first the prosecutor, then the victims’ representative, and lastly the defence, to question the two expert witnesses it had called. The Katanga and Ngudjolo Chamber categorized witnesses into those called by the Chamber proprio motu under Articles 64(6)(d) and 69(3) and those called at the request of the legal representatives. For witnesses called by the Chamber proprio motu, the judges will normally conduct the initial questioning. The judicial questioning is to be followed by the examination of the witness by the prosecution, legal representatives, and the defence, in that order. The questioning of the Chamber’s own witnesses must normally be conducted in a neutral fashion; but ‘cross-examination’ by the parties may be allowed on a case-by-case basis.

For the witnesses called by the Chamber at the request of the legal representatives (which will normally be limited to their clients), the Chamber may allow them to examine those witnesses before or after the Chamber, after which the prosecution may conduct their examination, with the defence having the opportunity to ask questions last.

3.3.4 Modes of examining witnesses in practice

As noted, the ICC Statute and Rules do not use the terminology associated with particular domestic legal traditions to refer to the modes of examining witnesses, resorting instead to neutral notions. This means that the Trial Chambers can define and apply the questioning modalities that do not emulate the ‘common law’ or ‘civil law’ manners of eliciting testimonial evidence. Equally, the Chambers could draw upon and directly adopt the modalities from certain legal traditions, not only in respect of denomination, but also basic principles. In the ICC proceedings that reached the trial phase thus far, the interpretation of questioning modalities varied by the Chamber. The Lubanga and Bemba Chambers preferred using neutral—even if somewhat unwieldy—terms, although this did not preclude the parties or the Chambers themselves from occasionally resorting to ‘adversarial’ language...
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...for the sake of convenience. The Bemba Chamber took this logic further, as reflected in its default preference for the neutral mode of questioning by the parties and legal representatives. By contrast, the Katanga and Ngudjolo as well as Ruto and Sang Chambers did formally adopt the traditional common law terminology in their directions for the conduct of the trial. By using these approaches as a single frame of reference, the parties in the Banda and Jerbo case used both neutral and ‘common law’ language interchangeably to refer to the available questioning modalities. Whilst the use of varying terminology is a secondary issue, the real question at stake is whether the terminological differences are underpinned by any nuances in the terms of the nature and scope of each of the questioning modalities.

A. Questioning by the party calling the witness / Examination-in-chief

The scope and mode of questioning by the party calling a witnesses or examination-in-chief are informed by the fact that it is conducted in the opening phase of testimony. Its primary rationale is to elicit from the witness an account of events (or a professional opinion in case of experts) on the issues relevant to the charges in the way supportive of the calling party’s case. The scope of the initial questioning is not limited in the areas that can be explored, except for the self-evident need for it to address the matters relevant to the charges and/or contested issues, and prior notification by the party calling the witness. Trial Chamber II held that as a matter of principle, it will only allow questions that are ‘clearly and directly relevant to contested issues’; the unavoidable issues of historical background and contextual elements should be as much as possible narrowed down in scope to matters on which the parties are in disagreement. Moreover, the party will be expected to confine its examination-in-chief to the themes it proposes to raise with a certain witness, subject to any instructions by the Chamber on this matter.

Insofar as the purpose of the first round of questioning is to generate a witness’ free account of facts in issue under control by the examining party, the mode of questioning must be neutral. The Lubanga Chamber ruled that ‘leading questions should not be used for contentious areas ’[t]o the extent it is known or anticipated that part or all of the evidence of
the witness is in dispute’. Subsequently in the trial, it clarified that with a view to expediting the trial, it is not per se inappropriate to lead on the questions of birth, identity, general background and education of witnesses, whereas on the matters in their stories which come close to the topic of the charges they must be allowed to testify without ‘artificial prompting’ by the relevant party. In a similar vein, the Katanga and Ngudjolo Chamber ruled that generally, only neutral questions are allowed during examination-in-chief. Except for uncontested areas, neither leading nor closed questions are allowed, the former being ‘questions framed in such a way as to suggest the answer sought or to assume the existence of facts yet to be established’ and the latter being those ‘framed in such a way that the answer can only be binary (yes or no)’. In the course of the Katanga and Ngudjolo trial, the objections to leading questions asked by a party examining in chief were upheld. In Banda, the parties agreed to be bound by the rule against leading a witness at the initial questioning with the exception of ‘any background evidence or on other issues that are not contentious with the prior consent of the opposing Party’, in the interest of expeditious proceedings. As noted, the Bemba Chamber held in its direction, without specifying the relevant mode of questioning, that it ‘expects all parties and participants to ask neutral questions to the witnesses’. This point has been challenged by the OTP, but not in relation to the examination-in-chief. The directions rendered for the conduct of the Kenyan trials thus far did not contain any rules or limitations regarding this mode of questioning.

Should the evidence provided by the witness during examination-in-chief not help the calling party’s case but on the contrary undermine it, that party may declare the witness ‘hostile’ and the Chamber may allow it to proceed with the cross-examination of that witness. Such ‘mutated’ examination-in-chief may only focus on the issues raised during the earlier part of the testimony or contained in the witness previous statements. During the Katanga and Ngudjolo trial, the question arose of whether the party may cross-examine its witness without having been declared her hostile and whether such declaration may be entered with regard to certain parts but not the entirety of the testimony. This concerned the prosecution witness (P-250) whom the OTP wished to cross-examine on those parts of testimony which contradicted previous statements without declaring the witness adverse. In an oral decision, Trial Chamber II declined the request and invited the prosecution to decide whether to continue with the examination-in-chief or to ask the Chamber to declare the witness hostile. It turned down the subsequent prosecution’s request to recognize that witness adverse on five points of his testimony, ruling that ‘once a witness has been declared hostile, this applies to his or her entire testimony’ and that ‘[i]t is therefore not possible for the party calling the witness to cross-examine him or her only on discrete parts of his testimony and also retain the right to conduct a normal examination-in-chief on other

650 Lubanga Rule 140 oral trial decision (n 547), at 37.
652 Katanga and Ngudjolo trial directions (n 567), para. 66.
654 Banda and Jerbo joint submissions (n 604), para. 13.
655 Bemba trial directions (n 536), para. 15.
656 Katanga and Ngudjolo trial directions (n 567), para. 67.
657 Ibid.
658 For litigation, see Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, ICC-01/04-01/07-T-97-Red-ENG, TC II, ICC, 8 February 2010, at 7-68.
660 Ibid., para. 2.
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The prosecution unsuccessfully sought leave to appeal under Article 82(1)(d) on the question of whether the Chamber erred in concluding that (i) the party calling a witness may not show to the witness his previous statement in case of inconsistencies and in the absence of the Chamber’s finding that the witness lacked memory; (ii) that party may not ask leading questions on discrete matters unless the witness is declared generally hostile.\(^{662}\)

**B. Questioning by the party not calling the witness / Cross-examination**

In line with Rule 140(2)(c), the parties are entitled to question a witness about relevant matters related to the witness’s testimony and its reliability, the credibility of the witness, and other relevant matters. As in the *ad hoc* tribunals, the purposes of this round of questioning by the party other than the one calling a witness are: (i) to diminish the negative effect the testimony could have on the outcome by challenging the credibility of the witness and exposing its weaknesses, including improbabilities, contradictions, and inconsistencies with other evidence, as well as by way of discrediting the witness or raising doubt as to his reliability; and (ii) to elicit evidence favourable to the questioning party. This imposes certain limitations as to the scope of questioning while at the same time gives a broader leeway as regards the admissible modes of examination. Given the inherently confrontational nature of this testimonial phase, this examination mode is subject to the Chamber’s duty to protect the psychological well-being and dignity of the witnesses and victims\(^{663}\) and to ensure that questioning is conducive to the ascertainment of the truth and does not result in an unnecessary waste of time.\(^{664}\)

In *Lubanga*, the Trial Chamber ruled that, in accordance with Article 69(3), the party may question the witness it has not called about matters which go beyond the scope of the witness’s initial evidence.\(^{665}\) The interpretation it gave to ‘other relevant matters’ referred to in Rule 140(2)(c) included: (i) trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence); and (ii) sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered).\(^{666}\) When posing questions on such other matters, the parties are obliged to put the respective part of their case to the witness, in order to avoid the need to recall the witness unnecessarily.\(^{667}\) Although the term ‘cross-examination’ was not used, there appears to be no real difference between that form of examination, as practiced elsewhere, and the ‘questioning by the party other than calling a witness’.

The *Lubanga* Trial Chamber accepted that disclosure of the parties’ lines of questioning in advance is in principle not mandatory, because questioning by the party that has not called the witness normally takes a course determined by the issues raised, extemporaneous questions asked, and answers given during the testimony.\(^{668}\) The exception may be warranted in order to protect traumatized or vulnerable witnesses, in which case the parties may be ordered to disclose in advance the questions or the topics they seek to explore...
during their questioning.\textsuperscript{669} Such disclosure would be governed by Rules 77 and 78 and be subject to Regulation 52(2) of the Regulations of the Registry.\textsuperscript{670}

In \textit{Katanga and Ngudjolo}, the Trial Chamber interpreted the parties’ right under Rule 140(2)(b) as the right to ‘cross-examine’ the witness and, more generally, regarded it as the ‘principle of fairness’.\textsuperscript{671} It handed down detailed directions on the legitimate scope and modes of cross-examination. The subject-matter of cross-examination is limited to: (i) matters raised during examination-in-chief; (ii) matters of the witness’ credibility; and (iii) matters relevant to the case for the cross-examining party, even when not raised in examination-in-chief.\textsuperscript{672} Before asking questions on the matters falling with category (iii), the cross-examining party shall state clearly to the witness that his evidence provided during examination-in-chief is in contradiction with its case.\textsuperscript{673} Providing information on the cross-examining case in relation to the adverse evidence given by the witness allows the witness to appreciate the context in which the questions are asked to make sure the witness is not caught unawares. Cross-examination is the only opportunity for the party to elicit from an adverse witness information useful for its own case or for the determination of the truth. Therefore, the party must put to that witness all further questions on the matters relevant to its case – it will not be allowed to re-call the same witness if it has already had an opportunity to cross-examine her.\textsuperscript{674} This also concerns the defence for the accused other than on whose behalf the witness has been called: non-joint witnesses must be asked all questions related to the cross-examining team’s case on this occasion.\textsuperscript{675}

The \textit{Katanga and Ngudjolo} chamber emphasized the need to ensure that cross-examination contributes to the ascertainment of the truth and is not abused to frustrate or delay it. To that end, it handed down detailed guidelines to be followed by the parties:

\begin{itemize}
  \item[a)] Questions must pertain to matters of fact that could reasonably be expected to be known to the witness. Unless the witness is called as an expert, parties may not ask witnesses to speculate or explain their opinion about facts not known to them.
  
  \item[b)] Before putting questions about contextual elements and/or the historical context of the case, counsel must state the purpose behind the question and explain how the evidence sought is relevant to the confirmed charges.
  
  \item[c)] Questions probing the credibility of the witness and the accuracy of his or her testimony are allowed, but must be limited to factors that could objectively influence reliability. When the witness has fully answered the question, the party cross-examining the witness will not be allowed to put further questions aimed at impeaching that answer without permission of the Chamber.
  
  \item[d)] If a witness did not provide all his or her testimony orally during examination-in-chief because the testimony was introduced by way of prior recorded testimony under rule 68(b), the cross-examining party must limit questioning to: i. issues contained in the passages of the prior recorded testimony that were relied upon by the party calling the witness, or ii. matters that are relevant to its own case. The Chamber will not allow cross-examination on matters raised in the previously recorded testimony that have not been tendered into evidence by the party calling the witness.\textsuperscript{676}
\end{itemize}

\textsuperscript{669} Ibid.
\textsuperscript{670} Ibid., para. 34. Regulation 52(2) ICC Regulations of the Registry (‘For the purpose of the presentation, participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing.’).
\textsuperscript{671} Katanga and Ngudjolo trial directions (n 567), para. 68.
\textsuperscript{672} Ibid., para. 69.
\textsuperscript{673} Ibid., para. 70.
\textsuperscript{674} Ibid., para. 73.
\textsuperscript{675} Ibid., para. 76.
\textsuperscript{676} Ibid., para. 71.
The Chamber expressed a strong preference for coordination between defence teams towards joint cross-examination. In case they nevertheless decide to conduct several consecutive cross-examinations, the subsequent defence team’s questioning shall be closely monitored by the Chamber in order to exclude repetitive questions, notably those going to the credibility, and limit it to matters directly relevant to their client.677

The party cross-examining a witness is limited less than the party examining-in-chief in terms of questions that it may legitimately pose to the witness. The Katanga and Ngudjolo Chamber held that at cross-examination both leading and closed questions are normally allowed.678 Exceptionally, in the cross-examination conducted by the co-accused, such questions may not be posed in relation to matters that are being raised for the first time, unless the witness is clearly adverse to the cross-examining co-accused.679 The same is true for ‘challenging questions’ which seek to undermine the credibility of a witness.680 The relative freedom with regard to the manner of questioning comes with a certain responsibility for the cross-examining party and imposes a duty on the Chamber to monitor and enforce compliance with the standards of civilized and respectful treatment of the witness. The Katanga and Ngudjolo Trial Chamber emphasized that it would disallow abusive interrogation that assaults the dignity of a witness or exploits his vulnerability as well as any other forms of unprofessional and unfocused questioning, including ‘unwarranted speculations’ or ‘concealed speeches’.681

The Bemba Chamber similarly held that ‘the party not calling the witness may ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as on mitigating and/or aggravating circumstances and reparation issues’.682 As noted above, the uncertainty regarding the mode of examination by the party not calling the witness, combined with the general requirement that all parties and participants must ask neutral questions to the witnesses,683 led the prosecutor to seek leave to appeal on two issues.684 But the Chamber refused to grant leave as it found issues not to be appealable issues arising from its decision (Article 82(1)(d)). It held that the prosecution misinterpreted the decision as imposing ‘an absolute, indiscriminate “ban” on the use by the parties of leading questions when questioning any witness’.685 In the Chamber’s view, a preference for the neutral mode of questioning does not amount to a prohibition on leading questions.686 The Chamber dismissed the prosecution’s interpretation of its directions as failing to impose an obligation on the ‘opposing party’ to put its case to the witness it has not called if it intends to elicit information relevant thereto.687 It stated that ‘[t]he fact that the Chamber’s Decision is silent on this issue does not interfere with counsel’s obligations in either presenting evidence or acting on behalf of the accused pursuant to the Rules and in keeping with counsel’s respective codes of conduct’,688 without, however, indicating what rules of procedure or provisions of codes establish such an obligation. It is precisely because there is such a gap and in order to provide parties with certainty regarding trial procedure that it is advisable for the ICC Trial Chambers to issue detailed and clear directions under Rule 140(1). The prosecution application illustrates that silence on an important issue in the

677 Ibid., para. 72.
678 Ibid., para. 74.
679 Ibid., para. 76.
680 Ibid., para. 75.
681 Ibid., paras 74-5.
682 Bemba trial directions (n 536), para. 13 (emphasis added).
683 Ibid., para. 15.
684 See text to supra n 662.
685 Decision on the Prosecution’s Request for Leave to Appeal the Trial Chamber’s Decision on Directions for the Conduct of the Proceedings, Prosecutor v. Bemba (n 643), para. 19.
686 Ibid.
687 Ibid., para. 22.
688 Ibid.
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Chamber’s directions leaves them open to conflicting interpretations, and that its decision providing procedural guidance to the parties was less effective than, for instance, that of the Katanga and Ngudjolo Chamber.

In Banda and Jerbo, the parties defined the scope of the ‘subsequent questioning pursuant to Rule 140(2)(b)’ as including ‘contesting the evidence given by a witness during the initial questioning, challenging its reliability, and impeaching the credibility of the witness’, as well as matters beyond the witness’s initial testimony. Unlike legal representatives who may in principle only ask neutral questions, the cross-examining party may lead the witness.

In its second trial directions, Ruto and Sang Chamber held that ‘[a] basic rule of fairness requires that … questions [regarding credibility] be put to the witness by any cross-examiner inclined to make an issue out of them later in the case’ and that cross-examining parties are expected to put all such questions at first opportunity when the witness is on the stand.

Besides the matters of credibility, the Chamber ruled admissible those questions that ‘sensibly go beyond the scope of the examination-in-chief’, including ‘on matters that relate to aspects of the cross-examiner’s case, when the party can expect the witness to have knowledge thereof, and irrespective of whether those matters were previously discussed in examination-in-chief’, subject to the requirement of relevance and reasonableness, to be determined on a case-by-case basis. While the Chamber would not require a party to cross-examine any witness on any issue, this does not mean that that party may expect to be allowed to recall the witness who has not been fully cross-examined on an earlier occasion. Finally, the Ruto and Sang Chamber also encouraged the defence teams ‘to avoid cross-examination on grounds already covered by a prior cross-examiner’ and held that, unless defence teams agree otherwise, the order in which they cross-examine prosecution witnesses will alternate every witness.

C. Additional questioning by the party calling the witness / Re-examination

Although not envisaged in Rule 140(2), the repeated examination of the witness by the party which has originally called him has been permitted by the ICC Trial Chambers. Both the prosecution and the defence have the opportunity to explore issues raised for the first time during the examination by the other party, the Chamber, or the victims’ legal representatives. Should the calling party be deprived of the opportunity to put follow-up questions to the witness on the problematic areas in the testimony revealed during the cross-examination, the presentation of evidence would be ‘incomplete and unfair’. This modality of examination is of a circumscribed nature, as compared to the initial questioning, and must be limited to the matters raised in questions posed by the other parties, participants, and the Chamber. The new areas can be explored, subject to the Chamber’s

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689 Banda and Jerbo joint submissions (n 604), para. 15.
690 Ibid.
691 Ruto and Sang general directions no. 2 (n 611), para. 19.
692 Ibid., para. 20.
693 Ibid.
694 Ruto and Sang general directions (n 611), para. 14.
695 Lubanga Rule 140 oral trial decision (n 547), at 37; Katanga and Ngudjolo Chui trial directions (n 567), para. 77; Bemba trial directions (n 536), paras 9 and 14; Banda and Jerbo joint submissions (n 604), para. 16 (agreeing on ‘the opportunity to ask further questions of the witness (“re-examination”)’); Ruto and Sang general directions (n 611), para. 15 (‘Following cross-examination, the calling party will have the opportunity to re-examine the witness in relation to matters which were raised for the first time in cross-examination.’).
696 Lubanga Rule 140 oral trial decision (n 547), at 37.
697 Ibid. See also Bemba trial directions (n 536), para. 14 (‘the scope of questioning for additional questions by the prosecution shall be limited to issues raised for the first time during questioning by the defence or the victims’ legal representatives. Any additional questions from the defence shall be limited to matters raised
D. Final questioning by the defence

As noted above, Rule 140(2)(d) unequivocally entitles the defence to be the last party questioning the witness. Since no indication is given as to whose witnesses are meant, the ordinary meaning of the provision is that it applies to any witness, irrespective of what actor has called him or her. One ramification of this provision for the structure of the testimonial process is that the prosecution shall not be allowed to resume questioning after the repeated questioning (re-examination) by the defence of its witness in the manner analogous to ‘re-cross-examination’. This is a procedural advantage for the defence as it may conduct the final questioning of any prosecution witnesses that have been ‘re-examined’ or asked additional questions by the legal representatives or the Chamber. In addition, the ‘re-examination’ of a defence witness becomes the last occasion on which that witness may be subjected to questioning.

In Lubanga, the Chamber affirmed that the defence may ask the witness it has not called the necessary questions after secondary questioning by the prosecution on matters limited to those that have arisen since the earlier questioning on behalf of the accused. Trial Chamber II ruled to the same effect in Katanga and Ngudjolo Chui. However, it stated that where the defence does not exercise its right to cross-examine a particular witness, it waives the right to ask final questions of the witness, unless new matters are raised by additional questions of the Chamber or the participants after the examination-in-chief. This is logical, given that in case the defence waives its right to cross-examine, the prosecution neither needs nor is entitled to re-examine the witness. With regard to the mode of questioning that applies during this phase of testimony, the Lubanga Chamber held that leading questions are to be avoided.

For the Katanga and Ngudjolo trial, a more general stipulation was entered that the same rules that apply to examination-in-chief shall apply to final questioning. As noted, the Bemba directions have made neutral mode a default manner of questioning, which should equally apply to the final questioning by the defence. Finally, in Banda and Jerbo, the parties acknowledged Rule 140(2)(d) in agreeing on the following: ‘Any final questioning by the Defence should be limited to those matters that arose in the course of the questioning conducted by the Prosecution or Legal Representatives, or the Trial Chamber.’ They proposed to restrict the application of the rule against leading questions to the final questioning to witnesses the defence has called.

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698 Lubanga Rule 140 oral trial decision (n 547), at 37; Katanga and Ngudjolo Chui trial directions (n 567), para. 78; Banda and Jerbo joint submissions (n 604), para. 16.
699 Bemba trial directions (n 536), paras 9 and 11.
700 Lubanga Rule 140 oral trial decision (n 547), at 37 (‘If the Defence did not call the witness, it may ask questions again at this point if they are necessary, limited to those matters that have been raised since its earlier questioning.’).
701 Katanga and Ngudjolo Chui trial directions (n 567), paras 79-80 (‘if a witness was not called by an accused, the latter shall have the right to ask additional questions of the witness after he or she was re-examined by the party calling him or her. … Final questions are limited to matters raised since the Defence last had the opportunity to question the witness.’)
702 Ibid.
703 Ibid.
704 Banda and Jerbo joint submissions (n 604), para. 17.
705 Ibid.
If this qualification is accepted by the Chamber, this means that the defence might still lead witnesses it has not called, in departure from the directions issued by other Chambers.

E. Questioning by the legal representatives of victims

The opportunity for the victims’ legal representatives to partake in the examination of witnesses foreseen in Rule 91(3) is a novelty of the ICC procedural regime. Being a way for legal representatives to present their clients’ ‘views and concerns’, this opportunity does not amount to an unconditional right of victims to question witnesses but it is subject to the Chamber’s leave under Article 68(3) and Rule 91(3)(b). In determining the admissible mode and scope of the questioning by legal representatives, the ICC Trial Chambers have to strike a delicate balance between the various interests at stake. Similarly to the opportunity for the victims to lead and challenge admissibility of evidence on the guilt or innocence of the defendant, the victims’ questioning has come to firmly associated with the judicial truth-finding mandate in the Court’s jurisprudence.

The scope of questioning by the legal representatives is determined with reference to the notion of ‘personal interest’ of the victims. In an oral decision concerning the examination of the Chamber expert Mr. Garretón on behalf of the participating victims, the Lubanga Chamber considered whether there was sufficient connection between the victims’ personal interests and the testimony of the expert regarding the historical and socio-economical context of the crimes. The Chamber held, in particular, that the participating victims had ‘an undoubted interest in setting their personal experiences, and the harm it is said they individually experienced, in their true historical, economic, and social context’. Over the defence’s objections, the Chamber authorized the legal representative to ‘explore such aspects of these background matters as are relevant to each of them provided, and to the extent, that the areas are relevant to, and are of assistance in, establishing the context in which the alleged crimes have been committed’. The Chamber also addressed the defence’s argument that the ‘personal interests’ must be distinguished from the general or public interests. In keeping with its previous position that the mere ‘general interest’ would not suffice, the Chamber noted that the possible coincidence between the victims’ former interests with the interests of many others does not preclude the opportunity for them to question witnesses, because to remain ‘personal’ the interest does not necessarily have to be ‘unique or singular’. Therefore, the Chamber deemed it ‘critical that the areas of context and historical background have real relevance to the victims on whose behalf the questioning is being conducted’. On that basis, the Chamber identified several specific areas the victims could legitimately explore at questioning, to the extent not previously

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706 Katanga and Ngudjolo victim participation trial decision (n 485), para. 74.
707 See n 496; Rule 91(3)(b) ICC RPE (‘The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to Article 68, paragraph 3.’).
708 Katanga and Ngudjolo victim participation trial decision (n 485), para. 75 (‘such questioning must have as its main aim the ascertainment of the truth, since the victims are not parties to the trial and have no role to support the case of the Prosecutor. However, their intervention may potentially enable the Chamber to better understand some of the matters at issue, given their local knowledge and social and cultural background.’ Footnote omitted).
710 Ibid., at 8.
711 Ibid.
712 Lubanga victim participation trial decision (n 485), para. 96 (‘A general interest in the outcome of the case or in the issues or evidence the Chamber will be considering … is likely to be insufficient.’).
713 Lubanga transcript, 17 June 2009 (n 709), at 9.
714 Ibid.
covered in testimony and not limited to the contents of the written report. Finally, it confined the scope of victims’ questioning of the witness to: (i) the issues and areas in which the victims have a personal interest; (ii) the context and history which is relevant to the charges the accused faces; and (iii) the matters within the expertise of the witness (not limited to the contents of the written report).

The issue was revisited during the trial as the Lubanga defence requested the Chamber to apply a more limited definition of the ‘personal interests of the victims’ for the purpose of the questioning of defence witnesses by the legal representatives, in order to prevent them from facing ‘successive examinations carried out by multiple accusers’. However, the Chamber was reluctant to apply a different standard of ‘personal interest’ for the prosecution and the defence witnesses and held that the safeguard for the defence lies in ensuring that the manner and the timing of the legal representatives’ questioning is not prejudicial, which requires a fact-based analysis that may not be conducted in advance or in a generalized fashion. It also responded to the defence’s concern that its witnesses could be examined on behalf of anonymous victims, by observing that the anonymity will likely be lifted as regards the defence.

Rule 91(3) fails to provide specific guidance with regard to the scope and mode of the legal representatives’ questioning. Consequently, the Trial Chambers hold discretion in shaping the modalities of their questioning and may choose among several options implied in that Rule. Those range from allowing the legal representatives to pose leading or challenging questions by analogously to cross-examination, to requiring them to adhere to a neutral manner of examination at all times. The issue proved to be contentious in the Lubanga trial, after the Chamber requested one of the legal representatives to make sure that his questions were not ‘suggestive of an answer’ and instead were ‘neutrally put’. The Trial Chamber issued a detailed decision determining whether the legal representative may ask leading questions, which maintained that the special role of the victims’ legal representatives, distinct and separate from the parties, renders the traditional common-law terminology not helpful.

The novel character of victims’ active participation in the examination of witnesses requires a novel and sui generis manner of questioning. In line with the previous jurisprudence, the legal representatives’ questions may seek to clarify or to elicit evidence relevant to the victims’ personal interests, even if it goes to the guilt or

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715 Ibid., at 9-10 (‘The economic, ethnic, and political underpinnings of the conflict in Ituri, and its origins; the economic interests of those principally involved, the role they played, and the identities of the relevant armed groups; the extent to which individuals profited from the conflict and the destination of any financial or other gains, together with the exploitation of natural resources in this context; the general practice of recruiting child soldiers in the DRC, including Ituri, whether it was voluntary or enforced and the living conditions in the training camps; the role of foreign powers in the use of child soldiers, and the extent to which the conflict was national or international; and the damage caused by the conflict (including the psychological harm inflicted on children, particularly in the Mahagi region.’).

716 Ibid. (also reaffirming the need for the questions to be ‘proportionate, relevant and focused’ and to not (routinely) amount to ‘submissions’).

717 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, TC I, ICC, 11 March 2010, paras 7 and 28.

718 Ibid., para. 35 (adding that ‘[t]he Chamber must take a global view for each witness, to ensure that the overall effect of the questioning by victims does not undermine the rights of the accused and his fair and impartial trial.’).

719 Ibid., para. 36.

720 Lubanga transcript, 6 May 2009 (n 642), at 14.

721 Lubanga victims’ questioning trial decision (n 642).

722 Ibid., para. 24 (‘As participants in the proceedings, rather than parties, the victims’ legal representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.’).

723 Lubanga victim participation appeal decision (n 485), para. 102.
innocence of the accused.\textsuperscript{724} The Trial Chamber recalled that the participatory rights of the victims at trial, including the opportunity for the legal representatives to question witnesses under Rule 91(3), have been intertwined in the case law at both trial and appellate level, with Article 69(3) and the broader purpose of ‘assisting the bench in the pursuit of the truth’.\textsuperscript{725}

This overarching goal of victim participation in the trial proceedings prodded the Trial Chamber to the conclusion that there is ‘a presumption in favour of a neutral approach to questioning on behalf of victims’ and that victims ‘are less likely than the parties to need to resort to the more combative techniques of “cross-examination”’.\textsuperscript{726} In contrast to the traditional common law paradigm, which proclaims the superiority of cross-examination as a truth-finding device, the Chamber considered that neutral questioning is better suited to the discovery of the truth than cross-examination. However, it also acknowledged that where views and concerns of the victims conflict with the evidence given by a witness, it may be fully consistent with the role of the legal representatives to ‘seek to press, challenge or discredit a witness’ and to pose closed, leading, or challenging questions.\textsuperscript{727} The reversible presumption in favour of neutral questioning entails that the determination of whether the legal representative may depart from it could only be dealt with on a case-by-case basis and that end an oral request must be made to the Chamber by the legal representative.\textsuperscript{728} Thus, the Lubanga Chamber sought to devise a unique mode of questioning for the legal representatives as a novel figure taking an active part in the proof-taking process. The construction eventually adopted is similar to the familiar mode of ‘questioning by the party calling the witness’ (or ‘examination-in-chief’), including the possibility asking leading and closed questions of witness that has turned hostile.

The Katanga and Ngudjolo Chamber adopted the more detailed directives regarding the questioning by the victims’ legal representatives, which reflect a stricter approach. From the outset, Trial Chamber II emphasized the core point that the examination of witnesses by the legal representatives has as its main purpose the ascertainment of the truth, as the consequence of the victims’ not being parties to the trial and having no role in supporting the prosecution case.\textsuperscript{729} The added benefit of such questioning is that it ‘may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background’.\textsuperscript{730} For the purpose of deciding on legal representatives’ applications made under Rule 91(3), the Katanga and Ngudjolo Chamber categorized the possible questions into: (i) those asked under Article 75 concerning potential orders on reparations; (ii) anticipated questions; and (iii) unanticipated questions.

For the first category of questions, the special regime of obtaining leave was deemed to be applicable, in light of Rule 91(4) which exempts the questioning by legal representatives at the hearings concerning reparations from restrictions set out in Rule 91(2)

\textsuperscript{724} Lubanga victims’ questioning trial decision (n 642), para. 26.
\textsuperscript{725} Ibid., para. 27.
\textsuperscript{726} Ibid., para. 28.
\textsuperscript{727} Ibid., paras 28-9 (‘it follows from the object and purpose of questioning by the victims’ legal representatives that there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.’).
\textsuperscript{728} Ibid., para. 30.
\textsuperscript{729} Katanga and Ngudjolo Chui trial directions (n 567), para. 82; Transcript, Prosecutor v. Katanga and Ngudjolo, Situation in the DRC, ICC-01/04-01/07-T-87-Red-ENG, TC II, ICC, 30 November 2009, at 33 (‘the legal representatives of the victims are not supplemental prosecutors or part two of the Prosecution. … [T]hey are not here to be … like the car that comes behind the squad of cyclists. They are not to gather up all the various questions and bring them all together at the very end. If that role is to be played by anyone, it will be played by the Chamber.’).
\textsuperscript{730} Katanga and Ngudjolo Chui trial directions (n 567), para. 82.
(for example, the unqualified right of the parties to make observations on the application within the time-limit set by the Chamber).\textsuperscript{731} When intending to pose a question relating to the potential order on reparation, the legal representative shall make a written application, which will be notified to the parties and include a note of the questions explaining the purpose and scope of the questions as well as any documents that will be used for questioning. In order to enable the Chamber to determine whether to allow the defence the opportunity to make observations, the application must be made as early as possible and not later than seven days before the witness’s first appearance.\textsuperscript{732}

A similar procedure applies to questions on matters other than reparations, which the legal representatives know in advance that they would like to ask a witness, expert, or the accused person. The written application for leave to pose the question, containing the proposed questions and explaining their relevance to the interests of the victims, must be notified to the Chamber and the prosecution at least seven days before the first appearance of the witness.\textsuperscript{733} In any event, the Chamber may authorize the legal representative, subject to Rule 91(3)(b), to pose the question at issue or will do it on his behalf before the cross-examination starts, if the relevant matter is not sufficiently addressed by the witness at the examination-in-chief.\textsuperscript{734} By contrast, the unanticipated questions of the legal representatives on the unforeseen matters directly pertinent to the interests of the victims and arising out of the examination-in-chief may be put to the witness by the Chamber, if it deems this necessary for the ascertainment of the truth or clarification of the testimony of the witness.\textsuperscript{735} Indeed, after the prosecution concluded the examination-in-chief of its first witness and before the defence cross-examination, the Chamber posed three questions to the witness on the areas proposed by the legal representatives deemed valid in light of those goals.\textsuperscript{736}

Citing the decision in \textit{Lubanga},\textsuperscript{737} the \textit{Katanga and Ngudjolo} Chamber underscored that the legal representatives’ questions are of a residual character, which predetermines their purport and scope. It ruled that they must in principle aim to clarify or complement previous evidence given by the witness. The factual questions going beyond matters raised during examination-in-chief may be allowed, subject to the four conditions:

\begin{itemize}
  \item[a)] Questions may not be duplicative or repetitive to what was already asked by the parties.
  \item[b)] Questions must be limited to matters that are in controversy between the parties, unless the Victims’ Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented.
  \item[c)] In principle, Victims’ Legal Representatives will not be allowed to ask questions pertaining to the credibility and/or accuracy of the witness’s testimony, unless the Victims’ Legal Representative can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented.
  \item[d)] Unless the Chamber specifically gave authorisation under regulation 56 of the Regulations, Victims’ Legal Representatives are not allowed to put questions pertaining to possible reparations for specific individuals or groups of individuals.\textsuperscript{738}
\end{itemize}

\textsuperscript{731} \textit{Ibid.}, para. 86. See Rule 91(4) ICC RPE (‘For a hearing limited to reparations under Article 75, the restrictions on questioning by the legal representatives set forth in sub-rule 2 shall not apply. In that case, the legal representatives may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned.’).
\textsuperscript{732} \textit{Katanga and Ngudjolo Chui} trial directions (n 567), paras 84-5.
\textsuperscript{733} \textit{Ibid.}, para. 87 (the TC may also reclassify the application and submit to the defence for observations, which are to be given within three days).
\textsuperscript{734} \textit{Ibid.}, para. 88.
\textsuperscript{735} \textit{Ibid.}, para. 89.
\textsuperscript{736} \textit{Katanga and Ngudjolo} transcript, 30 November 2009 (n 729), at 45-6.
\textsuperscript{737} See supra n 724.
\textsuperscript{738} \textit{Katanga and Ngudjolo Chui} trial directions (n 567), para. 90.
Trial Chamber II also endorsed the Lubanga jurisprudence in relation to the nature of the questioning by the victims’ legal representatives. Without extensive discussion, it held that such questioning must be conducted neutrally and avoid leading or closed questions, unless the Chamber specifically authorizes a deviation from this rule, in which case the questioning will be reminiscent of cross-examination.739

These principles were upheld in the subsequent trials. In Bemba, Trial Chamber III noted that despite ‘slight differences in the formulation of the approach’ towards organizing the questioning by the legal representatives between the Lubanga and Katanga and Ngudjolo Chambers, ‘the underlying position is the same’ and ‘it has been demonstrated in both trials as providing an effective means of addressing the issue’.740 The Bemba Chamber thus generally adopted it, while reserving the right to vary it if necessary. It instructed the legal representatives of victims to set out in a discrete written application the nature and the detail of their proposed questions to witnesses seven days before the witness is scheduled to testify.741 Subsequently, the Chamber granted applications by two legal representatives to question the insider witness 33 due to testify on the mode of liability and the crime of pillage, over the objections by the defence that insider witnesses are ‘collectively unlikely to be able to give evidence which impacts upon the personal interests of the victims’.742 The Chamber found that the interests of victims go beyond questions concerning the physical commission of the crimes and extend to the question of who should be held liable, and that they must accordingly be allowed to explore these areas by posing some of the questions they proposed that were deemed appropriate by the Chamber.743

The Ruto and Sang Chamber directed the legal representatives wishing to examine a witness to apply to the Chamber by means of a reasoned filing notified to the parties, seven days in advance; the period may be altered in the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony.744 The victims’ questions must be relevant to their interests, not repetitive of questions asked by the calling parties, and may not formulate any new allegations against the accused.745 The Chamber adhered to the approach adopted by Trial Chamber I favouring a neutral form of questioning as a presumption, which may departed from upon granting of an oral request made at the stage of examination.746

Finally, the parties in Banda and Jerbo have agreed that the default mode of examination of witnesses by the legal representatives must be neutral, while leaving the broader framework for victims’ questioning to the Chamber to establish.747

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739 Ibid., para. 91 (‘If the Victims’ Legal Representative is authorized to challenge the credibility/accuracy of a witness’ testimony, leading, closed as well as questions challenging the witness’s reliability are allowed, subject to the same limitations as outlined in relation to cross-examination.’ Footnote omitted); Katanga and Ngudjolo victim participation trial decision (n 485), para. 78.
740 See Bemba victim participation trial decision (n 485), para. 40.
741 Ibid., para. 102(h).
742 Decision (i) ruling on legal representatives’ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, Prosecutor v. Bemba, Situation in the CAR, ICC-01/05-01/08-1729, TC III, ICC, 9 September 2011.
743 Ibid., paras 16-7.
744 Ruto and Sang general directions (n 611), para. 19. See also Ruto and Sang victim participation decision (n 485), para. 74.
745 Ruto and Sang victim participation decision (n 485), para. 75.
746 Ibid., para. 76 (noting also that it may limit ‘the questioning time in proportion to that used for that witness by the calling party.’).
747 Banda and Jerbo joint submissions (n 604), para. 14 (suggesting that during both the prosecution and the defence cases: ‘The Legal Representatives shall use, in principle, neutral questions.’).
F. Judicial questioning

Rule 140(2)(c) codifies the power—which it, oddly, formulates as the ‘right’—of the judges to conduct questioning of a witness before or after he or she has been questioned by either of the parties pursuant to Rule 140(2)(a) or (b). The Rule does not clarify the scope and mode of judicial questioning. These are essential matters which effectively shape the truth-finding and trial-management competences of the Trial Chamber and define its role at trial. The powers that inform the purport and character of the questions from the bench most are the powers and duties to control the proceedings before it, to perform its truth-finding function, and to ensure a fair trial for the accused and safety and well-being of victims and witnesses. Given the broad scope of those powers and the discretion vested in the Chamber in exercising its duties, there is a potential for expansive interpretation by the Chamber of its own competence to participate in the questioning of witnesses. In this light, it is telling that some ICC Trial Chambers have already interpreted the quite unambiguous provision of Rule 140(2)(c) as authorizing their intervention not only before or after the questioning by the parties, but virtually at any time. As the ad hoc tribunals’ experience shows, establishing the boundaries of judicial questioning is a matter that may be urgent for the parties, but it is also an utterly delicate subject for litigation.

The power of the Trial Chamber to ask questions in order to clarify testimony, even if in the course of the examination of a witness by the parties, is uncontroversial and inherent in its competences to control the proceedings and to ensure a fair and expeditious trial. Pursuant to the Regulation 43 of the Regulations of the Court, the Chamber must ‘[m]ake the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth’ and to ‘[a]void delays and ensure the effective use of time’. Similarly, the duty of the Chamber under Rule 88(5) to remain ‘vigilant in controlling the manner of questioning of a witness or victims so as to avoid any harassment or intimidation’, a fortiori with respect to the victims of sexual violence, renders its power to moderate questions addressed to the victim or witness by a party unquestionable.

The regime governing judicial questioning on the merits aimed at eliciting information relevant to the determination of the guilt or innocence of the accused is less clear, and are overshadowed by the differences between the ‘adversarial’ and ‘inquisitorial’ configurations of the fact-finding role of trial judges. The crux of the matter is that in an ‘adversarial’ model, in which the presentation of evidence is the sole responsibility of the parties, the active substantive questioning by the judges is an oddity inconsistent with the basic principles and potentially interfering with case strategies of counsel. On the contrary, in an ‘inquisitorial’ model the judges are entitled and obliged to ask all questions that they believe need to be asked in order to establish the truth.

A number of ICC provisions may be interpreted as establishing a fundamental principle that the judicial questioning must at all times serve the purpose of ascertaining the truth. This form of questioning is therefore a self-standing modality of examination distinct from examination-in-chief or cross-examination. Questioning by legal representatives, with truth-finding as a professed goal and neutral manner of putting questions as a default mode, is arguably a closer analogy. This overlap is visible in particular when the Chamber puts questions to the witness upon request of the legal representatives under Rule 91(3)(b). However, the parallel with victims’ questioning is not truly useful when it comes to determining the admissible subject-matter and manner of judges’

748 Regulation 43 ICC Regulations of the Court.
749 Arts 64(6)(d) and 69(3) ICC Statute; Rule 140(2)(c) ICC RPE.
750 Arts 64(2), 67(1) and 68(1) and (3) ICC Statute; Rule 88(5) ICC RPE.
751 See supra 3.2.2.F.
752 E.g. Art. 69(3) ICC Statute; Regulation 43 of the Regulation of the Court.
753 See e.g. supra n 736.
questions. In case of questioning on behalf of legal representatives, it is the Chamber itself which selects, in accordance with its mandate, the questions that promote the establishment of the truth. The question about the exact scope of the ‘truth’ to be explored through, and ascertained by, judicial questions remains. In particular, it is unclear whether the judges’ questions may venture outside of the matters directly relevant to the charges before it as confirmed by the Pre-Trial Chamber.\footnote{One may note, for example, that most questions posed by Judge Odio Benito in the course of the \textit{Lubanga} trial—and in the manner that can be described as ‘consistent’—sought to illuminate areas not related to the charges, such as those concerning recruitment of and sexual offences against girls: Transcript, \textit{Prosecutor v. Lubanga, Situation in the DRC}, ICC-01/04-01/06-T-114-ENG, TC I, ICC, 3 February 2009, at 80-4; Transcript, \textit{Prosecutor v. Lubanga, Situation in the DRC}, ICC-01/04-01/06-T-123-ENG, TC I, ICC, 10 February 2009, at 32-3; Transcript, \textit{Prosecutor v. Lubanga, Situation in the DRC}, ICC-01/04-01/06-T-194-ENG, TC I, ICC, 18 June 2009, at 42-7; Transcript, \textit{Prosecutor v. Lubanga, Situation in the DRC}, ICC-01/04-01/06-T-202-ENG, TC I, ICC, 2 July 2009, at 13-6; Lubanga transcript, 13 January 2010 (n 622), at 63-4; \textit{Lubanga} transcript, 25 January 2010 (n 624), at 11-2.}

Another question is whether the judges’ questions must at all times remain neutral in line with the principle of judicial impartiality or can they be leading or closed.

The otherwise highly detailed \textit{Katanga} and \textit{Ngudjolo} trial directions provide no guidance in this respect. But in the \textit{Lubanga} trial, the defence raised concerns that the subject-matter and form of the many questions from the bench would have compromised the appearance of judicial impartiality, had they been asked of defence witnesses. The defence requested the Chamber to determine the principles governing judicial questioning in relation in part of: (i) the subject-matter of the questions; (ii) the form of the questions; and (iii) the rights of the defence to challenge questions put by the judges, resulting in a leading decision being issued by the Chamber on these matters.\footnote{Decision on judicial questioning, \textit{Prosecutor v. Lubanga, Situation in the DRC}, ICC-01/04-01/06-2360, TC I, ICC, 18 March 2010 (‘\textit{Lubanga judicial questioning decision}’), para. 1.}

With respect to issue (i), the \textit{Lubanga} defence submitted that the Chamber’s power under Article 69(3) should be exercised strictly within the scope of the charges confirmed against the accused, which entails that the judges’ questions should not introduce into the proceedings ‘criminal acts or charges’ falling beyond the scope of the confirmed charges.\footnote{\textit{Ibid.}, para. 4. The defence pointed that out of 133 questions from the bench, 107 concerned ‘sexual violence and the presence of girls and women in the armed forces’. See n 754.} The Trial Chamber disagreed with the contention that the decision confirming charges precludes it from asking questions relating to ‘other criminal acts’, insofar as the information on the same may be relevant to a possible sentencing stage as mitigating or aggravating factors, which the Chamber is authorized to hear pursuant to Rule 145(1)(b) and in keeping with its previous jurisprudence.\footnote{\textit{Ibid.}, paras 33-8. Authorizing the introduction of materials relevant to sentencing matters during trial, see \textit{Lubanga} witness testimony trial decision (n 547), para. 32; Transcript, \textit{Prosecutor v. Lubanga, Situation in the DRC}, ICC-01/04-01/06-T-99-ENG-ET, TC I, ICC, 25 November 2008, at 39-40.} The evidence on other criminal acts may be relevant to ascertaining the particular defencelessness of the victims or particular cruelty of the acts with which the accused is charged.\footnote{\textit{Lubanga} judicial questioning decision (n 755), para. 38. See Rule 145(2)(b)(iii) and (iv) ICC RPE.} Second, the information on ‘other criminal acts’ may prove to be relevant to reparation orders under Article 75(2), in accordance with Regulation 56 and earlier case law.\footnote{\textit{Lubanga} judicial questioning decision (n 755), paras 120-2.}

Third, the Chamber was of the view that the evidence on the alleged criminality other than encompassed by the charges is helpful as a means of ‘establishing the true context of, and background to the facts and circumstances described in the charges’.\footnote{\textit{Lubanga} judicial questioning decision (n 755), para. 39. See further \textit{Lubanga} victim participation trial decision (n 485), paras 120-2.} Finally, the Trial Chamber referred to the lack of authority for the qualification the bench may neither go beyond ‘facts and issues that have been ignored, or inadequately dealt with, by counsel’ nor the facts described by the charges in its
questioning.\textsuperscript{761} This reasoning attests to the Chamber’s understandable reluctance to limit itself in the subject-matter of questions it may pose to witnesses and indicates its legally and practically unfettered discretion in this regard.

In a similar vein, the Chamber dismissed the defence’s arguments that judges must avoid leading witnesses because leading questions could hint at the personal opinions held by the judges on the acts the materiality of which or involvement in which by the accused are challenged by the defence, and thereby suggest a desirable answer to the witness.\textsuperscript{762} The Chamber emphasized its discretion to decide on the appropriateness of using leading questions, which is a case-specific determination.\textsuperscript{763} The possibility for the judges to lead a witness, rather than question him or her neutrally, was not ruled out.\textsuperscript{764} In noting the absence of any mandatory parameters of judicial questions, the Chamber drew upon the position in both civil law and common law systems.\textsuperscript{765} The strong language was used by the Chamber to describe a hypothetical endeavour to limit the scope and character of the judicial questioning (‘a serious interference with the independence of the judiciary’). This illustrates fairly well the sensitivity of the issue.

The third argument by the defence in favour of its right to challenge the form and contents of the judges’ questions was dismissed by a counter-argument \textit{ad absurdum} that ‘such an approach would put the Bench in the unrealistic position of ruling on its own questions, following objection and submissions’.\textsuperscript{766} It would be different had the judge’s question been put on the basis of an error, in which case counsel should appropriately bring this to the attention of the bench. The defence’s reference to the Presiding Judge’s statement at trial that could be interpreted to the effect that for the purpose of questioning the Chamber would defer to the parties, was dismissed as taken out of the context.\textsuperscript{767} The Chamber’s overarching conclusion was that it would proceed with the questioning of witnesses in the manner that it determines appropriate.\textsuperscript{768}

The trial directions issued by the other Chambers to date give the issue of judicial questioning short shrift and merely reiterate that the Chambers has a power under Rule 140(2) to question witnesses as it considers appropriate.\textsuperscript{769} The parties’ agreement in \textit{Banda} and \textit{Jerbo} did not content with this jurisprudence.\textsuperscript{770} The \textit{Ruto and Sang} Chamber stated that it ‘may ask questions to the witness at any stage of the testimony, including before the questions from the calling party’, without addressing the manner of questioning.\textsuperscript{771} It is likely that the \textit{Lubanga} Trial Chamber’s statements will have an enduring effect on the ICC jurisprudence on this issue.

\textsuperscript{761} \textit{Ibid.}, para. 41.
\textsuperscript{762} \textit{Ibid.}, paras 6-8, 43-7.
\textsuperscript{763} \textit{Ibid.}, para. 43.
\textsuperscript{764} \textit{Ibid.}, para. 46.
\textsuperscript{765} \textit{Ibid.} In passing, the TC observed that the defence ‘has materially misdescribed the nature of judicial questions to date’ as suggestive: see \textit{ibid.}, para. 47.
\textsuperscript{766} \textit{Ibid.}, para. 48.
\textsuperscript{767} \textit{Ibid.}, paras 9 and 50 (the statement in fact meant to decline the proposal of the Defence to take over the entirety of the examination, as opposed to the judges asking questions as deemed appropriate). See further Transcript, \textit{Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-T-227-CONF-ENG-ET, TC I, ICC}, 14 January 2010, at 3 (‘I am not inclined … to return to counsels’ benches to start examining witnesses in detail on what may be highly contentious issues in this trial. It is infinitely preferable that matters that may become significant are … dealt with through questioning by counsel rather than by the Judges’).
\textsuperscript{768} \textit{Ibid.}, para. 49.
\textsuperscript{769} \textit{Bemba} trial directions (n 536), paras 7 and 15 (expecting ‘all parties and participants to ask neutral questions to the witnesses’, without mentioning the Chamber).
\textsuperscript{770} \textit{Banda and Jerbo} joint submissions (n 604), para. 12.
\textsuperscript{771} \textit{Ruto and Sang} general directions (n 611), para. 17.
3.3.5 The order and manner of submission (and other use) of documents at trial

Given that the main focus of this Chapter is on the submission of testimonial evidence, this section addresses the order and manner of submission and use of documents in ICC trials in a lesser detail. Like before other tribunals, the special regime governs the sequence and manner of submitting to the ICC Trial Chamber of documentary evidence. It follows from Article 69(2) of the ICC Statute that the evidentiary process of the ICC favours the evidence to be presented orally. This is a corollary of the principle that the accused be given a ‘public hearing’ (Article 67(1)), one aspect of which is the requirement of an ‘oral hearing’. However, this preference for live testimony is not absolute, for the second sentence of the same article makes clear that the ‘Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio-technology, as well as the introduction of documents or written transcripts’. Both the mild prioritization of live testimony and the recognition of the circumstances that may warrant the use of alternative types of evidence were reflected already in the Court’s early jurisprudence.773

One noteworthy aspect of this regime is related to the rights of victims to participate in the proceedings and, in particular, to the possibility for them to submit evidence on the guilt or innocence of the accused. This opportunity extends also to the documentary evidence. Trial Chamber II held that the legal representatives of the participating victims are not precluded from requesting it to allow them to submit documentary evidence, as a way of expressing ‘views and concerns’ within the meaning of Article 68(3).774 Like with oral evidence, the opportunity for the legal representatives to introduce documentary evidence ‘would indeed assist it in its implementation of article 69 (3) of the Statute, and by the same token, in its search for the truth’.775 The legal representatives must file a written application showing the relevance of the proposed document and its ability to contribute to the establishment of the truth; and the parties and participants are entitled to be notified of it and to file their observations.776

The specific practice has developed for the submission of documentary evidence, depending on the manner chosen for doing so. Like before the ad hoc tribunals and the SCSL, the more traditional way of introducing such evidence is through a witness in the course of his or her testimony. However, it is not always worth calling a witness if his or her expected testimony is essentially limited to serving as a conduit for putting documentary evidence on the record. An alternative to introducing documentary items through a witness is the admission into evidence directly by the counsel during the hearing. Next to being submitted into evidence, documents and material objects can serve procedural functions during the hearing. For example, they may be relied upon by the parties and participants when questioning the witness, whereas the witnesses may in certain circumstances be

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772 Art. 69(2) of the ICC Statute (‘The testimony of a witness at trial shall be given, except to the extent provided by the measures set forth in Art. 68 or in the [RPE]’).
773 Decision on the admissibility of the four documents, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1399, TC I, ICC, 13 June 2006, paras 22 (‘although the Rome Statute framework highlights the desirability of witnesses giving oral evidence … the second and third sentence of Article 69 (2) provide for a wide range of other evidential possibilities … Therefore, notwithstanding the express reference to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate.’) and 24 (‘the Chamber … enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.’).
774 Katanga and Ngudjolo victim participation trial decision (n 485), para. 98.
775 Ibid.
776 Ibid., para. 99.
allowed to use their notes to refresh their memory during testimony, in the interest of testifying effectively.

**A. Introducing documents through a witness and their use in questioning**

The orthodox way of introducing documents into evidence is through a witness. This is the most practical approach, for it enables the tendering party to introduce evidence as an organic part of its case (which essentially rests on the sequence of live testimony), whilst it also allows the other party, participants, and the Court better comprehend and test the relevance of the material in its proper context. According to the *Katanga and Ngudjolo* trial directions, a documentary item may be introduced through a witness by the party calling a witness, in case there is an ‘inherent correlation’ between the document and that witness.\(^777\)

The general principles for submitting documentary evidence recognized by the Trial Chambers, require, first, that each item be introduced during a hearing by the party who tenders it, and that the opposing party may comment on it.\(^778\) Second, in case the document is lengthy, the party shall clearly identify which passages are submitted into evidence.\(^779\) The nature of the documentary evidence, which may come in the form of voluminous materials, requires that the parties and the court are cognizant of its contents or its relevant portions before it is filed, in order to be able to comment and decide on admissibility.

Furthermore, the *Katanga and Ngudjolo* Trial Chamber set forth ‘model practices’ for the use of documents for the purpose of eliciting evidence at examination-in-chief or the cross-examination. In order to be allowed to rely on a document during the examination-in-chief, the party calling a witness must provide the Chamber, the parties, and the participants with a list of documents which it intends to use and to do so with respect to each witness.\(^780\) Because the opposing party needs sufficient time to prepare for cross-examination, the list of documents must be circulated well in advance of the day on which the witness is scheduled to start testifying and in any event no less than 3 days, pursuant to Regulation 52(2) of the Registry, or longer, depending on the length on the volume and number of the documents.\(^781\) The party that intends to use voluminous or numerous materials during examination-in-chief must specify precisely to which what passages it will refer.\(^782\) It is the responsibility of the calling party to communicate to the relevant witness the copies of the same documents well in advance of the testimony to enable him to study them.\(^783\) Communicating more documents than the party actually intends or is able to use in the examination is forbidden.\(^784\) This is meant to prevent the court and the parties from being overloaded with irrelevant information, even if used as testimonial aids rather than as evidence.

Less specific, albeit not less mandatory, regulations govern the applications by the victims’ legal representatives for authorization to tender a document ‘closely linked to the testimony of a named witness’.\(^785\) Trial Chamber II held that such application must be filed sufficient time prior to the witness’s testimony to enable the Chamber and the parties to study its contents. However, as the Chamber qualified, in any other circumstances, that is not before the close of the defence case, the application is due as soon as possible.\(^786\) This refers to the occasions on which witnesses are called by the Chamber on the request of legal

\(^777\) [*Katanga and Ngudjolo Chui* trial directions (n 567), para. 97.]

\(^778\) *Ibid.*, para. 95.


\(^780\) *Ibid.*, para. 103.

\(^781\) *Ibid.*


\(^784\) *Ibid.*, para. 106.

\(^785\) [*Katanga and Ngudjolo victim participation trial decision* (n 485), para. 100.]

representatives. Despite the lack of explicit directives limiting the quantities of material that may be tendered by the legal representatives, the Chamber may apply rules analogous to those set out for the parties’ documents. However, given that impossibility for the victims to independently investigate into the matters beyond the existence, nature and extent of the harm suffered, the need for specific regulations is limited. Similarly, the scope of the evidentiary participation by the victims, subordinate to the ex officio truth-finding power of the Chamber under Article 69(3) and its duty to protect the accused persons from any prejudice in connection with such participation, makes the situation in which the victims will be invited to submit multiple documents hypothetical.

The regime governing the use of documents for the purpose of cross-examination corresponds to the scope and purpose of that modality of examination, that is to explore issues raised during the examination-in-chief and certain other matters. Consequently, the use may be made of documents already on the trial record, including the transcripts of witnesses who have already testified, subject to applicable protective measures. Given that the purpose of cross-examination is also to challenge the credibility of a witness, reliability of the evidence, and to obtain evidence relevant to the cross-examiner’s case, references can also be made to the documents not on the trial record. The precondition is that the cross-examining party informs the Court and the Court officer of its intention to rely on such documents at least three full working days ahead of the day on which the witness is due to be cross-examined, and provides the relevant item electronically, in line with Registry’s Regulation 52(2).

B. Admission into evidence from the bar table

In Lubanga, the ICC Trial Chamber dealt for the first time with the request by a party (the prosecution) to introduce documentary evidence ‘from the bar table’. This implies ‘the situation when documents or other material are submitted directly by counsel, rather than introduced via a witness as a part of his or her testimony’. The bulk of the decision addressed the admissibility of documents referred to in the request and tackled the manner of submitting materials only in passing. The Prosecution was authorized to rely upon the documents found admissible by the Trial Chamber. The Lubanga Chamber did not pronounce specifically on the manner of submitting evidence but it was apparently of the view that the admission of evidence ‘from the bar table’ was possible.

The more detailed guidance on the submission of ‘[d]ocumentary evidence that is not a written record of testimonial evidence of a witness … without being introduced by a witness’ was provided in Katanga and Ngudjolo Chui. In the view of Trial Chamber II, the expediency of allowing for this modality of submitting evidence lies in obviating the need to call witnesses for the sole purpose of introducing documents. The Chamber held it

\[787\text{Ibid., paras 102-3.}\\788\text{Katanga and Ngudjolo Chui trial directions (n 567), para. 107.}\\789\text{Ibid., para. 108.}\\790\text{Decision on the admission into evidence from the bar table, Prosecutor v. Lubanga, Situation in the DRC,}\\\text{ICC-01/04-01/06-1981, TC I, ICC, 24 June 2009, para. 1.}\\791\text{The evidence concerned consisted in the documents ruled by the PTC to have been obtained in violation of the internationally recognized human right to privacy in result of a search and seizure exercise carried out by the Office of the Prosecutor of the Tribunal de Grande Instance of Bunia (DRC), in the presence of the ICC OTP investigator: see Decision on the confirmation of charges, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-803-ENG, PTC I, ICC, 29 January 2007, paras 62-90, in particular para. 81 (determining that the infringement of the principle of proportionality as a result of the search and seizure resulted in a violation of the right to privacy) and 90 (refusing to exclude the evidence under Art. 69(7), with reference to the minor character of the violation and the limited purpose of the confirmation hearing).}\\792\text{Katanga and Ngudjolo Chui trial directions (n 567), paras 98-102.}\\793\text{Ibid., para. 98.}\]
appropriate to tender documentary evidence not through a witness concerning ‘issues that must be proved, but about which there is relatively little controversy between the parties’.\textsuperscript{794} One may think in particular of a scenario foreseen in Rule 69 which entitles the Chamber to consider certain facts as being proven or to admit the contents of a document, the expected testimony of a witness or other evidence as uncontested, in case the parties agree to that effect, unless it is of the opinion that ‘a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims’. Leave of the Chamber is required for the submission of documents ‘directly from the bar table’. The Chamber’s decision on the application will be based on the consideration of the following factors, among others:

\begin{enumerate}
\item The nature and origin of the documentary evidence.
\item The relevance of the information contained in the document to matters at issue in the case.
\item Whether the content of the document is easily understandable or requires further explanation or interpretation.
\item If the information pertains exclusively to the historical background and/or contextual elements of the case, the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue.
\item The original purpose for which the document was created and to whom it was addressed. For example, whether a document was made in the context of legal proceedings or has a purely private character.
\item Whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified.
\item Whether it is possible to ascertain the method used to compile and process the information contained in the document.
\item Whether there are any doubts as to the authenticity of the document.\textsuperscript{795}
\end{enumerate}

This non-exhaustive list of the relevant aspects of the document sought to be introduced without going through a witness hints at the likelihood of the admission thereof in case the said item is relevant, uncontroversial with either party, self-explanatory, authentic, and verifiable. In terms of the procedure for obtaining leave, the Trial Chamber ruled that, where the tendering party intends to present several documents from the bar table, it shall prepare a table containing information on each item: (i) a short description of its content, (ii) an index of its most relevant portions; and (iii) a showing of its relevance and probative value.\textsuperscript{796} After the other party enters its comments in relation to each document, the table is to be submitted to the Chamber along with the application.\textsuperscript{797} Although the Katanga and Ngudjolo trial directions do not make it explicit, it is logical that the same procedure should apply in case a single document is sought to be admitted from the bar table: the tendering party must obtain the other party’s comments before leave is requested from the Chamber.

\textit{C. Use of documents to refresh memory}

The ICC trials have not, as a matter of principle, prohibited witnesses from relying on documents during their testimony with a view to refreshing memory and delivering an effective testimony. The problematic aspect of using documents as aids in the process,

\textsuperscript{794} \textit{Ibid.}, para. 99.
\textsuperscript{795} \textit{Ibid.}, para. 100.
\textsuperscript{796} \textit{Ibid.}, para. 101.
\textsuperscript{797} \textit{Ibid.}, para. 102 (providing also that it is the tendering party’s responsibility to ensure that the opposing party is given sufficient time to formulate its observations, although the former party may also request the latter that such observations are submitted within a reasonable time frame).
without their necessarily being added to the trial record, is that it may be in tension with the principle that testimony must normally reflect the personal recollections and knowledge of the witness.

In Lubanga, two experts invited by the Trial Chamber to summarize their reports by way of sworn testimony indicated a wish to rely on their speaking notes, or aides-mémoire, which would assist them in the process. The preliminary view expressed by the Presiding Judge—unopposed by either party or participant—was that: (i) such prompting notes are not disclosable; and (ii) it is the evidence of the witness that counts rather than his or her personal notes. Further in the proceedings, the legal representative applied to the Chamber to permit his testifying client to rely on an aide-mémoire. The Chamber ruled that such document must first be put before it for it to decide on the appropriateness of this course of action and to determine whether the document must be disclosed. Subsequently, it was held that such documents could be disclosed to the parties in a semi-redacted form as the legal representative did not object to it. However, it became clear, owing to the defence’s objection, that the witness called by the legal representative wished to use as aide-mémoire the applications for participation of the victims of whom he is was a guardian. The Chamber held that documents to be used to refresh memory must be limited to those which the witness had personally compiled.

In Katanga and Ngudjolo Chui, the Trial Chamber formulated a general rule that a witness shall testify to what he or she remembers having observed; however, the passage of time since the events to which the witness is to testify as well as the often traumatic nature of those events may justify a deviation from that rule. In particular, the witness may be allowed to refer to documents in order to refresh their memory only insofar as the documents in question: (a) contain the personal recollections of the witness; and (b) have been made available to the opposing party, who may use the portions of the document referred to by the witness at cross-examination. The Chamber held that it is irrelevant whether the said document is admissible as evidence. This clearly indicates that memory-refreshing documents are in fact extra-evidentiary items and do not make part of the trial record, unless their addition thereto as exhibits is specifically requested and effected. Should the witness have difficulties with consulting the documents for refreshing memory, the party calling the witness may request the Chamber to authorize it to assist the witness. However, in line with the ban on leading questions at examination-in-chief, such assistance may amount neither to suggesting the answer to the witness based on the aide-mémoire nor to paraphrasing its contents.

The practical application of these principles caused fairly extensive litigation between the parties in the Katanga and Ngudjolo trial, just as they did in the Lubanga case, already during the first examination-in-chief. In particular, the defence objected to the use by the prosecution witness of the previous statement as an aide-mémoire because, inter alia, that particular statement was not contemporaneous with the events to which the witness testified. The Chamber held that the matter merited a case-by-case analysis of whether the

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798 Lubanga transcript, 7 January 2010 (n 635), at 1-2.
799 Lubanga transcript, 8 January 2010 (n 561), at 20.
800 Ibid., at 21-5.
801 Ibid., at 26-8.
802 Katanga and Ngudjolo Chui trial directions (n 567), para. 109.
803 Ibid.
804 Ibid., para. 110.
805 Ibid., para. 111.
806 Ibid.
807 Notably, even the witness himself got involved in the discussion: see Katanga and Ngudjolo transcript, 27 November 2009 (n 653), at 15-27.
808 Ibid., at 15-7 and 21-2. Co-counsel for the defence maintained that what the prosecution intended to do by reading out the relevant portion of the previous statement to the witness in order to refresh his memory, was in
general rule that witnesses must testify from what they remember ought to be departed from in accordance with the exception anticipated in the trial directions. In particular, the case may be recognized as falling within the exception, taking into account, among others, the witness’s profile, the facility of expression that the witness has demonstrated, and his ability to recollect the relevant facts. In casu, based on the identified parameters, the Chamber ruled that the relevant exception was not applicable and the witness did not need his memory to be refreshed. Thus, the prosecution was invited to proceed without a memory-refreshing exercise, by merely reformulating its questions in an attempt to obtain the answers it had in mind. Subsequently, the prosecution request to refresh the memory of a witness regarding certain names by way of reference to an exhibit was refused upon the objection by the defence, presumably for the same reason. At least on one occasion thereafter, the Chamber demonstrated its strict adherence to the rule that witnesses with a good mastery of the events do not need their memory to be refreshed, prodding the prosecutor to content itself with rephrasing the questions. One example illustrating the appropriateness of memory-refreshing is the prosecution’s application to let the witness consult the relevant pages of his own notebook, itself to be produced as an exhibit, in order to enable him to refresh his memory concerning certain dates. None of the defence teams was opposed to this, as the entries in the notebook were personal recollections and had been entered contemporaneously with the events in question. The request was granted by the Trial Chamber, and the witness had an opportunity to review the exhibit during the testimony. However, the witness should not be allowed to refresh memory solely for the reason that the answers the witness provides during the examination-in-chief (or, for that purpose, also during the re-examination) are not as precise or accurate as in the earlier statements or as the calling party would want them to be.

3.3.6. Possibility of mid-trial acquittals

Unlike the ICTY, ICTR, and SCSL RPE, neither the ICC Statute nor the ICC Rules explicitly provide for a possibility of acquittals after the close of the prosecution evidence. This is a consequence of the open-ended structure and details of the ICC trial procedure in the ICC legislation. The ICC legal framework does not expressly provide whether there should indeed be separate cases for each of the parties. Insofar as the presentation of evidence may be organized as a sequence of distinct evidentiary blocks per party, it remains possible for the ICC to employ an analogue of the ICTY Rule 98bis procedure. Several
commentators have not excluded this eventuality. 819 Under the ICC legal framework, motions for acquittal may, for example, be filed pursuant to Article 64(8)(b) of the Statute and ICC Rule 134(3), the latter authorizing the judges to rule on any issue arising in the course of trial. 820 However, as Friman et al. point out, the existence of a confirmation of charges procedure at the ICC, which serves to filter out the charges not adequately supported by ‘sufficient evidence’, may indicate that, if it is ever to be used at the ICC, ‘no case to answer’ will be confined to those rare instances where charges appear ex ante to be sufficiently substantiated, but break down during their presentation and examination at trial’. 821

In light of the ICC trial practice, the possibility of resorting to the ‘no case to answer’ procedure is not merely theoretical: all ICC trials to date have been organized around multiple cases, and the prosecution evidence has invariably opened the sequence of evidence presentations. 822 In the first trials, however, no motions for the judgment of acquittal have been filed; nor was this avenue even considered by the Chamber’s when devising the applicable trial procedure. However, in Kenya I, the Trial Chamber held that it ‘will, in principle, permit the Defence to enter submissions, at the close of the case for the Prosecution, asserting that there is no case for it to answer at the end of the Prosecution’s presentation of evidence’, and that reasons for permitting this procedure as well as any further guidance regarding the applicable legal test would be given in a due course. 823 It remains to be seen whether and how the ‘halfway determinations’ will be used at the ICC and what format they would acquire in practice.

3.4 SPSC

3.4.1 General features

The hybrid nature of the SPSC model merits limited discussion of the order and modes of the presentation of evidence to the trial panel. In the SPSC regime, the conduct of investigations and collection of evidence was the prerogative of the prosecutor, who was duty-bound to investigate incriminating and exonerating circumstances equally with a view to establishing the ‘truth of facts under investigation’. 825 It was also the right of suspects and accused to request the prosecutor or investigating judge to order or conduct specific investigations in order to establish his innocence. 826 The powers of the investigating judge in this respect were limited to issuing warrants concerning investigative actions and safeguarding rights of the defendants during the investigation. 826 Furthermore, the public prosecutor was under a strict legal duty to disclose to the accused and his legal representative all inculpatory and exonerating evidence in its possession, 827 which the

819 May and Wierda, International Criminal Evidence (n 65), at 130; J. O’Dowd, ‘Commentary’ (n 389), at 132; R. Cryer et al., An Introduction to International Criminal Law and Procedure (Cambridge: Cambridge University Press, 2007) 387 (the ICC may argue an ‘inherent power’ to dismiss charges due to insufficient evidence).
820 Friman et al., ‘Charges’, in G. Sluiter et al. (eds), International Criminal Procedure 450.
821 Ibid.
822 But cf. Cayley and Orenstein, ‘Motions for Judgment of Acquittal’ (n 359), at 583 (stating that ‘[t]he ICC’s regime for the presentation of evidence follows more closely the civil law inquisitorial model’ to imply the irrelevancy of ‘halfway’ determinations in the ICC context) and 590 (interpreting the omission of the ICTY Rule 98bis analogue from the ICC Statute and RPE as an express recognition that ‘this particular common law rule has no useful place in international prosecutions’).
823 Ruto and Sang general directions (n 611), para. 32.
824 Sections 7.1 and 7.2 TRCP.
825 Section 6.3(e) TRCP.
826 Sections 9.1, 9.2, 9.3 and 9.5 TRCP.
827 Section 24.2 TRCP.
defence would inspect in order to ‘prepare the case’. These features point to the ‘adversarial’ aspects of the SPSC trial style, whereby the leading role in presenting evidence to the court during the trial belongs to the two respective parties.

That said, the panel was to be apprised of all evidentiary materials collected by the prosecutor in advance of the trial, which was to be delivered to the judges along with the indictment. The TRCP employs the notion of ‘case file’, and the case file could in principle serve the judges in the same way as the civil law ‘dossier’. This hints at the possibility of conducting the trial in a more ‘inquisitorial’ manner. The TRCP is considerably more specific than the ICC Statute and Rules on the matter of trial procedure, and it is worthwhile examining how the different possibilities are accommodated within the hybrid nature of the SPSC model and, in particular, the provisions concerning the order of presentation or evidence and examination of witnesses at trial. The TRCP rules governing proof-taking at trial reflect the hybrid approach to the functions and competences of the parties and the panel, being experimental and unique in several respects. Thus, the TRCP provide that ‘[e]ach party is entitled to call witnesses and present evidence’, although it goes on stipulating that ‘[t]he presentation of evidence shall be directed by the Individual Judge or Presiding Judge’. As with other aspects of the SPSC process, it bears noting that the actual practice of the Special Panels often departed in significant ways from the letter of the TRCP, with no exception of the rules governing evidence and case presentation.

### 3.4.2 Order of presentation of evidence

In contrast with the ICC legal framework, UNTAET law stipulated the order in which the evidence was to be presented to the Court. According to Sections 33.1, 33.2, 39.2 of the TRCP, unless otherwise ordered, the regular sequence of evidence presentation included the following steps: (a) the statement of the accused, if he or she chooses to make a statement; (b) evidence of the prosecution; (c) evidence of the defence; (d) the opportunity for the prosecution to respond; (e) the opportunity of the defence to reply; (f) the additional witnesses and other evidence called by the Court; and (vii) in case the accused is found guilty, additional evidence from the parties before determining the appropriate penalty.

Notably, the steps of the ‘gross order’ of evidentiary presentation were not designated by common law terms such as ‘prosecution case’, ‘defence case’, ‘rebuttal’, and ‘rejoinder’, although they appear to fulfil the same functions. Except for the accused’s statement, regarded as a distinct step in the proof-taking, the sequence set out in Sections 33.1 and 33.2 follows largely the same trial scheme as that envisaged in ICTY and ICTR Rule 85(A).

The TRCP made allowance for the participation of victims in the proceedings other than at the hearings for the review of the accused’s detention. However, the possibility for them to be heard during trial did not include the right to call and present evidence. The only formal evidentiary role of victims was to testify as witnesses, which was not excluded by the TRCP. Apart from that, the victims also enjoyed the right to request the prosecution to conduct specific investigations or to take special measures in order to prove the guilt of the
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accused. Such measures, which the prosecutor might decline to take, could include the presentation of evidence suggested or provided by the victims. The omission of the victims’ evidence in the sequence of presentation indicates that in the SPSC procedural regime, the victims had no right to call, lead, or challenge the admissibility of evidence.

As noted, the sequence of evidence includes, and starts with, the statement by the accused. Section 30.5 TRCP further provides that, where the accused decides to make a statement, the court may question him or her about the statement and invite the public prosecutor and legal representative of the accused for additional questions. Whilst no indication of the probative value of such statement was provided, this was a discretionary matter for the Court and the statement could thus be qualified as evidence. This element draws upon the ‘inquisitorial’ approach to trial process. Other than that the sequence of the presentation of evidence before the SPSC is based on the ‘adversarial’ blueprint, with each party having an equal opportunity to present its case and to respond to the evidence of the opposing party and with there possibly being two rounds of presentation. The court’s competence to call additional witnesses or evidence was residual and was to be exercised with restraint, given that such evidence was to be presented only ‘after the parties have completed their submissions’.

With these comments being based solely on the TRCP, the features of the SPSC process as described have little to do with actual practice before the Special Panels. Reportedly, the phasing of many trials before the panels departed from UNTAET law considerably. In the absence of trial transcripts and without an opportunity to conduct trial observation, this extract from the JSMP report is instructive:

In the Dili District Court, evidence was invariably given first by the alleged victim, (if still alive), followed by other Prosecution witnesses, followed by Defence witnesses (if any), followed by the accused. … This order was followed quite rigidly by the Court with the consequence that once other witness testimony had been given, it was viewed as the “accused’s turn”. The Court did not appear to entertain the possibility that an accused might decline to give evidence and be questioned, as is his or her right according to section 6.3(h) of the Transitional Rules of Criminal Procedure…. A further problem with this order was that by leaving any statement or evidence from the accused until last it did not become apparent what, if any, matters were at issue until after unnecessary witnesses had been called.

According to the JSMP, this order of hearing evidence accorded with Article 160(1) of the Indonesian Criminal Procedure Code rather than Section 33 of the TRCP. The same concerns the practice of inducing the accused to make statements, which in fact mirrored the relevant provision of the Indonesian Code to the effect that ‘if an accused does not want to answer or refuses to answer a question which has been directed towards him or her, the presiding judge shall direct him or her to answer and after that the examination will be continued’.

834 Section 12.6 TRCP.
835 In the SPSC, the participating victims had no independent right to conduct their investigations, given the exclusive competence of the Public Prosecutor: Section 7.1 TRCP.
836 Chapter 9.
837 Section 33.2 TRCP.
838 JSMP interim report of April 2003 (n 831), at 21 (footnotes omitted). According to the JSMP, this order of hearing evidence in fact accorded with section 160(1) of the Indonesian Criminal Procedure Code rather than Section 33 TRCP. The same concerns the practice of inducing the accused to make statements, which in fact was in implementation of section 175 of the Indonesian Criminal Code, providing that ‘if an accused does not want to answer or refuses to answer a question which has been directed towards him or her, the presiding judge shall direct him or her to answer and after that the examination will be continued’. See ibid.
839 Ibid.
840 Art. 175 Code of Criminal Procedure (Indonesia).
3.4.3 Order of examination of witnesses

Section 36.6 of the TRCP established the following order of examination of witnesses: the witness shall first be examined by the court, by the party calling the witness, and then the opposing party. This order could be adjusted by the presiding judge if necessary. No special provision was made concerning the order of questioning witnesses called by the court itself, but the general rule would presumably remain applicable. The Presiding Judge was under an obligation to allow other judges on the panel to pose additional questions to the witness, without indicating the stage at which they could do so. Since the questioning commenced with the ‘examination by the court’, that would normally also include the other judges’ additional questions. Although the repeated questioning by the calling party and further examination by the opposing party were not explicitly envisaged, nothing in the TRCP precluded them, in principle. The victims whose participation in the trial could be allowed under Section 12.5 were not formally authorized to conduct questioning, although their participation in the examination could not be excluded either, given the broad discretion of the court to hear them during trial. Given the leading role of the presiding judge (and the bench) in the witness examination, the order of questioning reflected the one adopted in the ‘inquisitorial’ systems and presupposed the prior familiarity of the judges with the case materials.

The TRCP are open-ended when it comes to the manner and scope of questioning by the court and by the parties: no guidance is provided as to the differences between the questioning by the calling party and that by the opposing party, what matters are to be addressed, and how the questions are to be posed. Like Section 33 that governs the order of presentation of evidence, Section 36.6 eschews the overt common law terms such as ‘examination-in-chief’, ‘cross-examination’, and ‘re-cross-examination’ and uses culturally neutral language. The TRCP regime is flexible with regard to the order and modalities of examining witness, and the court holds ultimate authority to define those modalities. The only formal limitation is the duty of the Presiding Judge to exercise control over the mode and order of questioning witnesses in order to make it ‘effective for the ascertainment of the truth, avoid needless consumption of time and … ensure that experts and witnesses are questioned without pressure and without violation of their personal dignity’. Another judicial duty informing the available modes of questioning is the duty to take measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

Although UNTAET law is culturally neutral, one encounters numerous references to the notions of examination-in-chief and cross-examination in the SPSC jurisprudence. This does not mean that the respective common law rules were at all times strictly complied with. In actual practice of the SPSC, the TRCP were interpreted in the way that transposed of the relevant provisions of the Indonesian criminal procedure. Whilst this is not problematic per se, insofar as the questioning was kept within the boundaries, this was not always the case. It has been reported by the JSMP that

[leading questions from Judges as well as the Prosecution and Defence were the norm rather than an exception. Witnesses’ answers were often allowed to range far beyond the question asked. If a witness’ evidence differed from the statement that they had earlier given to the

841 Decision on the Defendant’s Motion to Exclude Prosecutor’s 27 January 2004 “Transfer of Material” from Court File, Prosecutor v. Mendes Correia, Case No. 19/2001, SPSC, Dili District Court, 1 March 2004 (‘Mendes Correia decision’).
842 Section 36.7 TRCP.
843 Section 36.8 TRCP.
844 E.g. Judgement, Prosecutor v. Domingos Amati and Francisco Matos, Case No. 12/2003, SPSC, Dili District Court, 4 March 2005, at 6-12; Mendes Correia decision (n 841), at 2; Judgement, Prosecutor v. Gaspar Leki, Case No. 05/2001, SPSC, District Dili Court, 14 September 2002.
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Prosecutor, the witness would often be cross examined by the Judge, Prosecutor and Defence on the differences. Often witnesses would be examined by the Judge, Prosecutor and Defence and then once again by the Judge, Prosecutor and Defence and then on occasion, once more. It appeared, in practice, that the process was not a reductive one, narrowing the issues in dispute and limiting admissibility accordingly so as to focus the proceedings and exclude material not strictly related to proving or disproving the charges. Rather the process appeared to be an expansive one, more directed towards allowing the entire “story” to be aired.

Furthermore, the JSMP highlighted that ‘after testimony from a witness the accused was always asked whether the testimony was true, false or partly true and partly false.’ It was argued that, whilst this practice accorded with section 164(1) of the Indonesian Criminal Procedure Code, it had no legal basis in the TRCP and was ‘a serious threat to the right to silence and the right against self-incrimination’ guaranteed in Section 6.3(h) of the TRCP.

The practice as described above departs visibly from the ‘adversarial’ principles of presenting evidence, such as the ‘narrowing the dispute’ approach to sequencing the rounds of questioning as well as strict adherence to the preset sequence of questioning. Nevertheless, the strict compliance with these tenets as such was not required under the terms of Section 36.6 of the TRCP, which explicitly authorized the court to deviate from the model sequence of examination provided therein. At the same time, assuming that the criticisms against the SPSC are factually accurate, some of them are certainly valid. One might argue with reason that the alleged lack of focus on the charges amounted to a failure of the panel to exercise control over the mode and order of questioning as a way ‘to make the presentation of evidence effective for the ascertainment of the truth’ and ‘to avoid needless consumption of time’ (Section 36.7 of the TRCP). Similarly, the practice of requesting the accused to comment on the evidence given by the witnesses is not foreseen in the TRCP, but nor is it excluded. On the contrary, under Section 36.6 additional questions may be asked by the members of the panel after the initial examination by the Presiding Judge and subsequent questioning by the parties. However, it is clear that the questioning by the judges may not direct the accused or witnesses, explicitly or implicitly, to incriminate themselves.

3.2.4 Submission and use of documents at trial

Section 37.1 of the TRCP prescribed that physical or documentary evidence could be presented to a witness during his or her testimony so that the witness could identify it and testify as to its relevance. This reaffirms the applicability within the procedural regime of the SPSC of the general rule that exhibits and documents should normally be submitted through a witness whose testimony is relevant to the respective item. At the same time, a dispositional rather than binding character of this provision attests that the other mode of submitting documentary evidence, such as the admission into evidence from the bar table, was not ruled out. Irrespective of the avenue chosen for the presentation of documents, the court could decide whether the documentary evidence shall be read out in court either partially or entirely.

845 JSMP interim report of April 2003 (n 831), at 21 (footnote omitted remarks that the practice of cross-examining a witness on his prior inconsistent statements in fact accords with section 163 of the Indonesian Criminal Procedure Code to the effect that in case of inconsistency with the evidence on the case file, the Judge must seek a clarification from the witness).
846 Ibid., at 22.
847 Section 37.1 TRCP.
3.5 ECCC

3.5.1 Order of presentation of evidence

The structure of the presentation of evidence before the ECCC is strikingly different from the ‘adversarial’ or ‘quasi-adversarial’ model adopted at the ad hoc tribunals, the SCSL, and the ICC in its first trials. Not only does the ECCC trial scheme make a pronounced step in the inquisitorial direction, as did the SPSC procedure in giving priority to the statement of the accused in the sequence of proof-taking, but it is truly ‘inquisitorial’ by nature. Although the ‘ECCC proceedings shall be fair and adversarial and preserve the balance between the rights of the parties’, the parties do not have cases of their own to put to the Chamber. They are to assist the judges in testing a single ‘case of the truth’ composed of the entirety of evidence on the dossier and any additional evidence proposed by the parties and agreed to by the Chamber during the Initial Hearing. This entails a completely different logic and sequencing of the trial from the trials held before other tribunals, which proceed in the way of a dialectic opposition between the two cases for the parties, whereby the case of the Trial Chamber (including any victims’ evidence, if ordered by the Chamber) is only residual and normally bears a limited value in the evidentiary context of the case.

Before turning to ECCC trial practice, the procedural framework needs to be delineated. As is the case with most civil-law systems, and in accordance with Rule 90(1), the merits phase of the ECCC ‘substantive hearing’ starts with the questioning of the accused, whom the president of the Chamber should first inform of his or her rights to be legally represented, to be presumed innocent, and to remain silent under Rule 21(1)(d). Rule 90(2) stipulates that: ‘The Co-Prosecutors and all the other parties and their lawyers shall also have the right to question the Accused.’ In the ECCC context, judicial interrogation of the accused is the key step in the taking of evidence by the court. Subsequently, the Chamber shall hear the Civil Parties, witnesses and experts, but ‘in order it considers useful’. Rule 91bis, entitled ‘Order of proceedings at trial’, obliges the president of the Trial Chamber to determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and the Civil Parties. In due course, the Chamber may consider whether the evidence adduced so far is sufficient and, if not, it may summon new witnesses or order additional judicial investigation to be carried out by the specially assigned judge(s). In case of additional investigations, the judge(s) shall investigate under the same conditions as the Co-Investigating Judges, by means of witness interviews, searches, seizures of evidence and ordering of expert opinions. Where the additional or new evidence is collected, it will need to be put before the Chamber and examined in court in order to serve as the basis for the decision. Whenever a party requests that new witnesses be heard or new evidence be admitted, it shall do so by a reasoned submission.
analogy with the procedure for reopening the case at the ad hoc tribunals and the SCSL, the party shall satisfy the Chamber of the admissibility of the proposed evidence under Rule 87(3) and that the requested testimony or evidence was not available before the opening of the trial.

Subject to any direction handed down by the Presiding Judge, the ‘gross’ order of the presentation of evidence in the ECCC trial is as follows: (i) questioning of the accused by the judges, Co-Prosecutors, civil parties and defence co-lawyers; (ii) hearing of the civil parties, witnesses, and experts in the order determined by the Chamber; and (iii) examination of the evidence gathered in the course of additional or new investigations ordered by the Trial Chamber.

This scheme is a general framework only and it gives but a limited idea of the actual structure of an ECCC trial and the scope and purport of any of its constitutive parts. It is therefore necessary to examine the trial practice of the ECCC in Case 001 and Case 002.

From its first trial, in the case of *Kaing Guek Eav (Duch)*, the Trial Chamber chose to structure the proceedings thematically, which enabled it to receive the relevant information consecutively—in the order set out above—from the accused, civil parties, witnesses and experts on an issue-by-issue basis. It identified seven issues on which the accused, civil parties, witnesses and experts would be questioned and ruling that the regular order of questioning ‘will be repeated in relation to each set of facts’. Accordingly, the sequence of examining the evidentiary material at trial was linked to the substantive topics, which were ordered chronologically, rather than to the formal criterion of which of the parties called a witness or expert, as would be the case in an ‘adversarial’ trial setting.

While this order was not mandated by the ECCC IR, nothing therein would prevent this mode of proceeding with the case presentation. At the same time, the thematical approach towards structuring the trial gives effect to the Trial Chamber’s power to hear the civil parties, experts, and witnesses ‘in the order it considers useful’. Such order may with reason be considered useful in the ECCC context since it is conducive to more focused and orderly examinations, the emergence of a coherent narrative of events, and a better comprehension of the evidence. Indeed, this sequencing also poses challenges such as possible time-consuming debates on the pertinence of the questions asked to certain topics, as well as the difficulty of ‘pigeonholing’ experts and witnesses into one topic-related slot when their expertise covers several areas of interest. But arguably, these issues are manageable: for example, with respect to witnesses relevant to more than one fact, the Chamber decided on a case-by-case basis whether it wished to hear them on all facts at once for the sake of efficiency or to recall them at an appropriate moment instead.

In relation to the more specific order of appearance of witnesses in *Duch*, the Trial Chamber issued scheduling orders on a regular basis whereby it structured the trial per themes and per witness (or other evidence-source) for the forthcoming periods.

859 *Ibid.*, at 1008-9 (discussing the limitations of the topic-by-topic scheme using the example of testimony of the expert Craig Etcheson).
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The considerably more voluminous and complex multiple-accused Case 002 (*Nuon Chea et al.*) posed serious challenges in terms of ensuring fair and expeditious proceedings. These challenges needed to be accommodated when defining the trial’s structure. At the Initial Hearing, the Trial Chamber gave (public) advance notification to the parties of the likely sequencing of the trial, as composed of four main topics and following the thematic approach.\(^ {862} \) Subsequently, as a way to ensure that at least some portions of the indictment against the accused, all of senior age and in fragile physical and mental health,\(^ {863} \) could be properly examined and adjudicated upon, the Chamber decided ‘to separate the proceedings in Case 002 into a number of discrete cases that incorporate particular factual allegations and legal issues’,\(^ {864} \) in accordance with the then newly adopted Rule 98\(^ {\text{ter}} \).\(^ {865} \) In the Chamber’s view, this measure would enable it ‘to issue a verdict following a shortened trial, safeguarding the fundamental interest of victims in achieving meaningful and timely justice, and the right of all Accused in Case 002 to an expeditious trial’.\(^ {866} \) This decision (combined with the severance of charges against Ieng Thirith due to her unfitness to stand trial) could not be without consequences for the scope of the themes envisaged by the Chamber for examination, since not all matters that otherwise fell thereunder were any longer relevant for the first part of the trial.\(^ {867} \) More specifically, the structure of trial and the order of appearance of the accused, civil parties, experts, witnesses were, as in the *Duch* trial, established by the Chamber in ‘witness orders’ covering forthcoming weeks and linked to the respective portions of the closing order.\(^ {868} \)

\(^{862}\) Transcript of Initial Hearing, *Nuon Chea, Ieng Sary, Khieu Samphan, and Ieng Thirith*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 27 June 2011, at 8 (establishing the following order: ‘1) the structure of Democratic Kampuchea; 2) role of each accused during the period prior to the establishment of Democratic Kampuchea including when these roles were assigned; 3) role of each accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication throughout the temporal period with which the ECCC is concerned, and number; 4) policies of Democratic Kampuchea on the issues raised in the indictment.’). Such indication was also provided earlier, during the Trial Management Meeting held on 5 April 2011, which proceeded in closed session. See Severance Order Pursuant to Internal Rule 89\(^ {\text{ter}} \), *Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 22 September 2011 (‘*Nuon Chea et al.* severance order’), para. 1.

\(^{863}\) *Nuon Chea et al.* severance order (n 862), para. 2.

\(^{864}\) Rule 98\(^ {\text{ter}} \) ECCC IR (adopted 23 February 2011, Rev. 7) (‘When the interest of justice so requires, the Trial Chamber may at any stage order the separation of proceedings in relation to one or several accused and concerning part or the entirety of the charges contained in an Indictment. The cases as separated shall be tried and adjudicated in such order as the Trial Chamber deems appropriate.’).

\(^{865}\) *Nuon Chea et al.* severance order (n 862), para. 8. The scope of the first segment of trial (002/01) was narrowed down to: (i) factual allegations in the Indictment as population movement phases 1 and 2; and (ii) Crimes against humanity including murder, extermination, persecution (except on religious grounds), forced transfer and enforced disappearances (in relation to phases 1 and 2). Thus, the first trial would not cover any issues relation to phase 3 of population movements and all allegations of, inter alia, genocide, persecution on religious grounds as a crime against humanity were deferred to the later stages of the case. See *ibid.*, paras 5-8 and Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E/124/2) and Related Motions and Annexes, *Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 18 October 2011, para. 10.

\(^{866}\) For the list of relevant topics, see Annex: List of Paragraphs and portions of the Closing Order relevant to Case 002/01…, *Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 8 October 2011. For the instruction to the parties to use the amended list after separation of the first trial and severance of charges against Ieng Thirith, see Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, *Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 18 November 2011, at 2.

\(^{867}\) E.g. Scheduling Order for Opening Statements and Hearing on the Substance in Case 002, *Nuon Chea et al.*, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 18 October 2011, at 3; Witness lists for early trial

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3.5.2 Order and manner of examination of witnesses

The ECCC IR establish who may question the accused, witnesses, civil parties, and experts and provide a limited guidance on the order of questioning. The admissible reach and modes of examination are informed by the civil law set-up of the process. Rule 90(1) of the ECCC IR provides concerning the questioning of the accused that: ‘The judges have a duty to raise all pertinent questions, whether these would tend to prove or disprove the guilt of the Accused.’ Normally, the judges will examine the accused first and, in an endeavour to do it exhaustively, will ask most relevant questions. This means that the trial judges are expected to take a lead role in the examination of evidence at trial. The other actors will content themselves with an auxiliary role and only raise additional questions. Further, the president and other judges of the Chamber have a primary role in conducting the examination themselves and in moderating it when conducted by other actors. When questioning the accused:

All questions shall be asked with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber and in the order as determined by him.\(^{869}\)

Rule 91(2) governs the questioning of other parties (i.e. civil parties) and witnesses and provides that: ‘The Judges may ask any questions and the Co-Prosecutors and all the other parties and their lawyers shall also be allowed to ask questions with the permission of the President.’\(^{870}\) Thus, in formal terms, the right of the Co-Prosecutors and all other parties and their lawyers to question civil parties, witnesses, and experts is conditional and subject to the President’s authorization.\(^{871}\) While all the parties have the right to object to the continued hearing of the testimony of any witnesses if they believe such testimony not to be conducive to ascertaining the truth, the president shall make a decision in any given case.\(^{872}\) The influence of the participants other than judges on the course of examination is more limited than in any other court. These arrangements allow the President—in consultation with the other judges—to exercise a tight control over the questioning and the kind of evidence that is being elicited, subject only to the questions’ pertinence as a means for ‘ascertaining the truth’.\(^{873}\)

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\(^{869}\) Rule 90(2) ECCC IR. The phrase ‘in the order determined by him [the President]’ was added on 17 September 2010.

\(^{870}\) Rule 91(2) ECCC IR further provides that ‘Except for questions asked by the Judges, the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber’. The provision to the effect that the judges may ask any questions of other parties and witnesses was added on 17 September 2010 (Rev. 6).

\(^{871}\) Rules 90(2) and 91(2) ECCC IR.

\(^{872}\) Rule 91(3) ECCC IR.

\(^{873}\) The IR contain provisions intended to ensure the proper balance between the President’s extensive managerial powers and an active participation by all members of the bench: e.g. Rule 85(1) ECCC IR grants the President of the TC the power to preside over the proceedings while facilitating interventions by other
In *Duch*, the ‘fine’ order of evidence, i.e. the sequence in which various actors will examine the suppliers and sources of evidence, was as follows: the judges at all times asked their questions first, followed by the Co-Prosecutors, Civil Parties, and lawyers.\(^{874}\) Notably, this order is formally provided for in the Rules only with regard to the questioning of the accused,\(^{875}\) but it has been extended also to the hearing of civil parties, witnesses, and experts. In line with the ECCC’s unequivocal choice for the continental trial scheme and in accordance with its Rules, no common law terminology (examination-in-chief, cross-examination, and re-examination) was used to refer to the different phases and modes of questioning, and no such phases of questioning could be discerned.\(^{876}\) The parameters governing those forms of questioning are therefore not applicable. The Chamber has gradually clarified the acceptable scope and modalities of questioning of the accused, civil parties, experts, and witnesses at trial. For example, it strictly prohibited repetitive questions and enforced this requirement.\(^{877}\) While avoidance of repetitive questioning is a valid objective in any trial system, its relevance is particularly high at the ECCC given that in that context whereby all suppliers of evidence are due to be questioned consecutively on the same set of facts by multiple examiners and without distinction made for the applicable modes of questioning.\(^{878}\) This makes the vigilant control over the substance of questioning and pro-active approach on the part of the Presiding Judge in curbing any repetitive and excessive questioning particularly important. During the trial, the Trial Chamber requested the examining lawyers for civil parties to ensure that longer questions are accurately put and to make sure to break them into smaller questions and, secondly, that they be formulated in the language respectful to the accused.\(^{879}\)

The unique challenges raised by Case 002, in terms of trial management, made the question of whether the civil law approach towards questioning is always appropriate in the ECCC context, more urgent. The complexity and volume of evidence that the judges would need to familiarize themselves with in order to be able to conduct effective examination of all witnesses may have rendered impractical the unqualified adherence to the principle that the Chamber must at all times take a leading role and question witnesses first. In fact, parties may have a better knowledge of evidence, for example the testimony of any additional witnesses they proposed to summon.\(^{880}\) On 17 September 2010, Rule 90(2) of the ECCC IR was amended to remove the phrase ‘after the judges’ which limited the timing for the questioning of the accused by the parties. This was meant to make the rule on the sequence of questioning more flexible and allow the allocation of responsibility for primary judges. Similarly, ‘the President may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth’, but only in ‘consultation with the other judges’.

\(^{874}\) *Duch* trial direction (n 857), para. 9.2 (stipulating that ‘[t]he parties—namely, the Co-Prosecutors, Civil Parties, Defence Counsel in that order will be given an opportunity to ask additional questions after the bench has concluded its questioning of the Accused, or a Civil Party, witness or expert with respect to each set of facts as set out above.’).

\(^{875}\) Rules 90(2) and 91(2) ECCC IR.

\(^{876}\) Transcript, *Kaing Guek Eav*, 6 April 2009 (n 860), at 3 (the TC clarifies that cross-examination as a manner of questioning typical of common law systems has no place before the ECCC).


\(^{878}\) Compare this with the ICTY and ICTR where witnesses are questioned by the calling party and the adversary party in turn (and occasionally, by the judges). Although testimony proceeds in two rounds, repetitive questioning is unlikely due to the specific objectives of, and limits on, cross-examination and re-examination.

\(^{879}\) Transcript, *Kaing Guek Eav*, 8 April 2009, at 1 and 9. See also Transcript (Trial Day 7), *Kaing Guek Eav (alias Duch)*, Case No. 001/18-07-2007-ECCC/TC, TC, ECCC, 9 April 2009, at 40-41 (the President noting that some questions were repetitive and lengthy and requiring that they be well-prepared and straightforward).

\(^{880}\) See Rule 80(1) and (2) ECCC IR.
questioning to a specific party rather than the court. For the purpose of the trial in Case 002/01, the Chamber issued a direction to the parties, through a legal officer, that:

Pursuant to Internal Rule 90, the President may allocate certain Accused, witnesses, Civil Parties, or experts to Trial Chamber judges who will then have primary responsibility for questioning that person. In addition, the President may, by memorandum, assign to the Co-Prosecutors, individual Defence teams or Lead Co-Lawyers the primary responsibility for examining specified witnesses, experts or Civil Parties. Such assignment shall be notified to the party concerned well in advance of the witness, expert or Civil Party’s testimony to enable the parties to prepare adequately.\(^\text{881}\)

Although modestly presented in the memorandum, this instruction has far-reaching implications for the nature of the ECCC trial proceedings. In particular, it potentially tunes down their purely inquisitorial nature. The practical reasons for this shift are understandable, but in fact there is nothing in the text of Rule 90 to authorize such reallocation of power. The delegation of the bulk of questioning from the judges to one of the parties is meant to alleviate the burden on the judges in Case 002. It must have become increasingly difficult for them to keep up with the volume of material to the extent that they would still be able to effectively exercise a primary role in the examination of all accused, witnesses, civil parties, and experts on the relevant matters. Indeed, where the relevant party is in fact more familiar with the relevant witness, expert, or civil party, and his or her forthcoming testimony, allowing that party to commence questioning may ensure a more meaningful and effective examination. In the \textit{Nuon Chea} trial, the Trial Chamber had wide resort to this mechanism by assigning the responsibilities for examination to the parties.\(^\text{882}\)

The sequence of questioning of each of the accused in Case 002/01 (in relation to each topic) was established as follows: the Trial Chamber judges assigned by the president; other judges; the co-prosecutors, lead co-lawyers for civil parties, and the defence teams in the order they are set out in the indictment (Nuon Chea, Ieng Sary, and Khieu Samphan), with the lawyers representing the accused being questioned having the final opportunity to ask questions.\(^\text{883}\) The Chamber has the prerogative at any relevant time to put questions to an accused, upon which the parties will be given the opportunity to pose questions. The default order of examination of accused is that set out in the indictment, unless otherwise decided.\(^\text{884}\)

After all accused have been questioned in relation to a certain topic, the Chamber and the parties would examine any civil parties, witnesses, and experts relevant to the same topic. Where the primary responsibility for the questioning has been reassigned to the Co-Prosecutors, the lead co-lawyers for the civil parties, or to a defence team, the judges would introduce the witness, civil party, or expert and conduct preliminary questioning; and the assigned party shall conduct the primary questioning.\(^\text{885}\) Then the other parties will be given an opportunity to pose questions in the same order \textit{mutatis mutandis} as for the accused (the

\(^{881}\) Response to issues raised by parties in advance of trial, \textit{Nuon Chea et al.} (n 867), at 3.

\(^{882}\) E.g. Advance notice of assignment of examination of three Civil Parties during first trial segment (5-16 December 2011), \textit{Nuon Chea et al.}, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 23 November 2011 (assigning to the civil party lead co-lawyers primary responsibility for the examination of the three civil parties during the first trial segment, to be limited to facts relevant to the first trial and to their suffering); Hearing of TCE-38 and TCE-44, \textit{Nuon Chea, Ieng Sary, and Khieu Samphan}, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 6 February 2012 (delegating responsibility for questioning two witnesses to the OCP and authorizing them to contact witnesses to determine their availability and assist the TC in planning and scheduling the hearing of their evidence).

\(^{883}\) Response to issues raised by parties in advance of trial, \textit{Nuon Chea et al.} (n 867), at 3.

\(^{884}\) \textit{Ibid.}

\(^{885}\) \textit{Ibid.}, at 4. In relation to civil parties, the parties were requested 'to guide their statements by asking each Civil Party to focus sequentially on [relevant] topics . . . , followed at the end by a statement concerning the harm suffered by them'.
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defence teams being the last). Like in the Duch trial, in order to avoid recalling witnesses or experts during Case 002/01, they must be examined on all topics relevant to that case that are within their knowledge, using the established topic sequence. Given the limited scope of the Case 002/01 trial and the varying relevance of the evidence of witnesses, civil parties, and experts to the identified topics, the Chamber’s legal officer did not issue time limits but emphasized the need for the parties to confine their questioning to the relevant areas and to refrain from repetitive questioning.

3.5.3 Submission of documents at trial

According to Rule 87(3), documentary and other physical evidence contained in the case file may be submitted to the Trial Chamber by the parties (or be put to the parties by the Chamber) by summarizing, reading out, or appropriately identifying its content in court. Thus, the evidence on the case file does not automatically become part of the trial record. The trial judgment may only be based on the documentary and exhibit evidence in the case file—and any additional evidence proposed by the parties and deemed admissible by the court—that has been submitted in the manners indicated above. Hence, unlike in the ad hoc tribunals and the ICC, the ECCC procedural framework is not familiar with the general requirement that documentary evidence ought to be submitted through a witness who can clarify its contents and a distinct option of submitting evidence from a ‘bar table’. Nor can the use of these terms be detected in the ECCC’s case law produced thus far.

Instead, the ECCC jurisprudence regarding the submission of documents to the Trial Chamber has focused on questions of admissibility. The Trial Chamber may reject the admission of evidence in certain circumstances. As concerns the evidence not already contained on the case file, the provision on ‘new evidence’ (Rule 87(4)) applies. This means that in addition to the general admissibility requirements under Rule 87(4), the party must ordinarily satisfy the Chamber, in a reasoned submission, that such evidence was not available prior to the opening of the trial or could not be discovered through the exercise of due diligence. In limited circumstances, the evidence that does not satisfy these criteria may nevertheless be admitted in the interests of justice. But generally the Trial Chamber will refuse to admit documentary evidence that was available at the start of trial, whether or not already in the case file, if the party has not made sure to include that evidence in its Rule 80(3) list.

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886 Ibid. (‘Witnesses, experts and Civil Parties will be questioned by the parties in the same order as for the Accused’).
887 Ibid., at 3.
888 Ibid., at 4.
889 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 (‘Although the wording of Rule 87(3) refers to “evidence from the case file”, it is apparent from the entirety of Rule 87 that material on the case file is not “evidence” as such until it is produced in court in accordance with Rule 87(2).’).
890 Rules 87(2) ECCC IR (‘Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination’).
891 Rule 87(3) ECCC IR (the Chamber may reject the evidence that is “a. irrelevant or repetitious; b. impossible to obtain within a reasonable time; c. unsuitable to prove the facts it purports to prove; d. not allowed under the law; or e. intended to prolong proceedings or is frivolous.”).
892 Decision on Civil Party Lead Co-Lawyers’ Internal Rule 87(4) request to place on the Case File and admit new evidence relevant to the victim impact (E285), Nuon Chea and Khieu Samphan, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 31 May 2013, para. 2.
893 Decision on Objections to the Admissibility of Witness, Victim and Civil Party Statements and Case 001 Transcripts Proposed by the Co-Prosecutors and Civil Party Lead Co-Lawyers, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 15 August 2013, para. 35; Decision on Internal Rule 87(4) Request of the Co-Prosecutors to Put before the Chamber Document D366/7/1.366, Case File No. 002/19-09-2007-ECCC/TC, TC, ECCC, 14 August 2013, paras 2-3. See Rule 80(3)(d) ECCC IR (the TC may order the parties to submit,
Even though the ECCC does not employ the ‘bar table’ procedure, rules analogous to those that apply in the context of that procedure have developed. In Duch, the Trial Chamber ruled that when putting a document before the Chamber, the party should specify whether or not it seeks consideration of the entire document.\(^\text{894}\) If only a portion of the document is sought to be admitted, the relevant part shall be identified.\(^\text{895}\)

### 3.6 STL

#### 3.6.1 Order of presentation of evidence

Similarly to Rule 85(A) of the ICTY and ICTR RPE, Rule 146(A) of the STL RPE entitles each party to call witnesses and present evidence. A significant difference, however, is that victims participating in the proceedings are allowed, upon notice to the prosecutor and defence, to request the Trial Chamber to call witnesses.\(^\text{896}\) Comparable to the structure of presentation emerging from the ICC practice,\(^\text{897}\) the victims’ right to adduce evidence causes a modification in the ‘adversarial’ sequence of proof-taking stage in the STL. The default order of presentation of evidence at trial—thus unless the Chamber rules otherwise—consists of: (i) evidence for the prosecutor; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) evidence for the defence; (iv) prosecutor evidence in rebuttal; (v) rebuttal evidence called at the request of victims participating in the proceedings; and (vi) defence evidence in rejoinder.\(^\text{898}\) Although Article 20(3) of the STL Statute provides for the Trial Chamber’s power, upon request or proprio motu, to call additional witnesses or order the production of additional evidence at any stage of trial, Rule 146(B) does not indicate within which slot in the default order such evidence would normally be heard.

An important departure of the STL trial process from the ICTY and ICTR trial scheme is that the STL RPE envisage a bifurcated structure of trial proceedings and uphold the distinction between a guilt-determining (trial) stage and a sentencing stage.\(^\text{899}\) Hence, if and after the person was convicted or pleaded guilty, the Trial Chamber may receive from the prosecution and the defence ‘any relevant information that may assist the Trial Chamber in determining an appropriate sentence’ as well as oral or written submissions of participating victims regarding the personal impact of the crimes on them.\(^\text{900}\) A separate post-verdict sentencing hearing may be held for that end. The watershed between the trial and sentencing stages is not required by the Statute. But the STL President’s explanatory memorandum suggested that a choice by the STL judges in favour of the ‘common law model’ was informed by a hindsight that the combined procedure ‘proved to be a mistake’.\(^\text{901}\) Then President Cassese recognized the validity of the criticism against the merged procedure to the effect that it puts the defence in a difficult position of having to

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\(^\text{894}\) Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), Kaing Guek Eav, Case File No. 001-18-07-2007/ECCC/TC, TC, ECCC, 28 October 2009, para. 3.

\(^\text{895}\) Ibid.

\(^\text{896}\) Rule 87(B) STL RPE (‘At the trial stage, a victim participating in the proceedings may request the Trial Chamber to authorize him, after hearing the Parties, to call witnesses and to tender other evidence.’).

\(^\text{897}\) See supra 3.3.1.B.

\(^\text{898}\) Rule 146(B) STL RPE.

\(^\text{899}\) Rules 87(B) and (C), 168, and 171(A)-(C) STL RPE.

\(^\text{900}\) Rule 171(A) and (B) STL RPE; Rule 87(C) STL RPE.

\(^\text{901}\) STL RPE Explanatory Memorandum (n 161), paras 45-6.
argue in mitigation of the sentence whilst pleading for acquittal.\footnote{Ibid., para. 45 (‘the accused and his counsel are often put in a difficult position in that they have to argue as to the accused’s lack of responsibility for the crime, while at the same time putting forward evidence and arguments relevant to any sentence which may be imposed.’).} He referred to two disadvantages of the single-hearing trial which motivated the STL’s return to the bifurcated evidentiary process:

(i) there may arise some confusion when Judges have to hear at the same trial stage both fact witnesses and character witnesses; and

(ii) during trial, the Trial Chamber may have to hear many ‘character witnesses’ concerning an accused even when it may ultimately decide to acquit that accused.\footnote{Ibid.}

Although the STL case presentation essentially embodies a three-case approach (prosecution evidence, victim evidence, and defence evidence), a clear distinction between the prosecution and defence cases made it possible to incorporate into the STL framework an analogue of ‘no case to answer’, which will be addressed below.

3.6.2 Order and manner of examination of witnesses

Article 20(2) of the STL Statute establishes the default order of examination of witnesses, which may be adjusted by the Chamber ‘in the interests of justice’. This order is reminiscent of the continental procedure, inasmuch as the examination starts with questions posed by the presiding judge, followed by those of other members of the bench, the prosecutor and the defence.\footnote{Citing the order of the examination of witnesses as one of the ‘inquisitorial’ features of the STL system, see STL RPE Explanatory Memorandum (n 161), paras 4 and 29.} Notably, that Article does not envisage the possibility for the victims to examine witnesses. In elaboration of Article 20(2), STL Rule 145(A) provides that the Chamber should proceed along these lines as set out above if the file submitted by the Pre-Trial Judge enables it to do so.\footnote{See ibid., para. 29 (noting that Rule 145(A) ‘presupposes that the Trial Chamber is provided with a complete file (dossier de la cause) enabling it to be familiar with the evidence collected both against and in favour of the defendant, as well as with all legal and factual problems that arise. However, in practice, the STL Pre-Trial Judge may be unable to compile such an exhaustive file.’).} In that case the order is specified as follows: each witness shall first be questioned by the Presiding Judge and other members of the Chamber, then by the party that has called the witness, and subsequently cross-examined by the other party, if it wishes to exercise that right; the witness may then be re-examined by the calling party.\footnote{Rule 145(A) STL RPE.} However, where the Chamber considers that the file submitted by the Pre-Trial Judge is not so complete as to enable it to adopt an active role in the examination of a witness as per Article 20(2), it may opt for an alternative—more ‘adversarial’—scheme,\footnote{Characterizing the Rule 145(B) route as ‘a return to the adversarial mode of conduct’, see STL RPE Explanatory Memorandum (n 161), para. 29.} as authorized by that article’s ‘the interests of justice’ clause. Under this approach, the party calling the witness questions her first, then the other party cross-examines her, if it wishes to, after which the former party may re-examine; the members of the bench retain the power to pose questions at any time.\footnote{Rule 145(B) STL RPE.}

Therefore, the system of examination of \textit{viva voce} witnesses before the STL is a two-gearied regime within which the prevalent testimonial arrangements may vary from case to case. The Chamber may adopt either the Rule 145(A) scheme or the Rule 145(B) scheme, depending on whether or not the evidence contained in the PTJ file is sufficient to enable the
judges to carry out an efficient continental-style interrogation. Both modes of proceeding may be departed from in the interests of justice. This encompasses, in particular, cases where, in accordance with Rule 87(B), the Trial Chamber authorizes participating victims, after hearing the parties and under the control of the Chamber, to examine or cross-examine witnesses. In this light, even under the Rule 145(B) regime, the STL trial arrangements will in reality be remote from the purely ‘adversarial’ algorithm, by virtue of participation of victims in the examination of witnesses. At best, such arrangements could be labelled as ‘quasi-adversarial’.

3.6.3 Procedure for the judgment of acquittal at the close of prosecution case

Similarly to the ad hoc tribunals, the STL Trial Chamber is empowered to ‘enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction on that count’ at the close of the prosecutor’s case. Rule 167 reproduces verbatim the present text of ICTY Rule 98bis and SCSL Rule 98. Such a judgment shall by rendered by an oral decision and after hearing submissions of the parties. The requirement of an ‘oral decision’ indicates that the STL judges have learnt from their predecessors’ experience and took into account the reforms of the procedure for halfway acquittals in the ad hoc tribunals.

The main difference between the antecedent tribunals and at the STL in this respect is that in the STL the stage at which inculpatory evidence may legitimately be led does not necessarily end with the close of the prosecution case (Rule 146(B)(i)). After the close of that case, ‘evidence called by the Trial Chamber at the request of victims participating in the proceedings’ may follow (Rule 146(B)(ii)) follows, during which additional (incriminating) evidence might be adduced. In this light, the question is whether the halfway determinations ought to take place not directly at the close of the prosecution case, as Rule 167 provides, but after victims’ evidence. On the one hand, this option may be at odds with the statutory requirement that ‘[t]he onus is on the Prosecutor to prove the guilt of the accused’. This principle entails that victims should not be allowed to assist the prosecutor in discharging his burden of proof, whether for the purpose of Rule 167 proceedings or for the purpose of the trial judgment under Rule 168. The traditional rationale of halfway ‘judgments of acquittal’ is to determine whether there is some prosecution evidence capable of securing a conviction, reflecting the possibility that a reasonable tribunal could convict on that basis. If this rationale holds, one may wonder why any victims’ evidence buttressing the prosecution evidence and increasing the chance of conviction should be taken into consideration in the Rule 167 determination.

On the other hand, the Trial Chamber’s evidence adduced at the request of the victims participating in the proceedings could cut both ways: theoretically, it could also undermine the prospects of conviction. The decision on what evidence may be presented on behalf of the victims and whether the burden of proof has been discharged, ultimately rests with the judges of the Trial Chamber, which is arguably in a position to minimize any prejudice for the defence in the context of the Rule 167 determinations. Moreover, under the express terms of Article 16(3)(c), it is the onus of proving guilt that is squarely on the Prosecutor, not the onus of proving that a reasonable tribunal of fact could convict on the

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909 Referring to this as a mixture between the inquisitorial and adversarial systems, see Cassese, International Criminal Law (n 214), at 412.
910 Rule 145(C) STL RPE.
911 Rule 167 STL RPE.
912 Rule 167 STL RPE (‘At the close of the Prosecutor’s case, the Trial Chamber may, by oral decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction on that count.’). See Rule 98bis ICTY and ICTR RPE; Rule 98 SCSL RPE.
913 See supra 3.2.4.
914 Art. 16(3)(c) STL Statute.
basis of some evidence before the court. So the argument could be made that because the two tests are essentially different, the inclusion of victims’ evidence into the equation of ‘halfway determination’ under Rule 167 is not precluded by Article 16(3)(c) of the STL Statute. In that case, the Chamber might defer its decision on the motion for the judgment of acquittal until the participating victims’ evidence has been heard. Given the relative novelty of victim participation regime and its uncertain effects on the trial system, it remains to be seen whether the STL Trial Chamber will strictly follow the text of the Rule or shift the ‘halfway determination’ one step later into the trial.

3.7 Summary

The idea that the way in which the presentation of evidence is structured, witnesses heard, and other evidence submitted, can make a world of difference in terms of fact-finding accuracy and procedural efficiency has engendered an almost ideological rivalry between the proponents of the two major models of process for the right to dominate in the context of international criminal procedure. This has urged the ever-ongoing quest at the tribunals for the model that can ensure the enhanced efficiency and fairness through the combination and mixing of the elements drawn from the domestic criminal procedure systems into that realm. With the benefit of hindsight of the ICTY and ICTR experience (which have in a limited sense been working from the Nuremberg and Tokyo precedents), the prevailing view on the optimal structure for the presentation of evidence has evolved considerably.

In the legislative sphere, this evolution has involved the shift from a primordial (and under-rationalized) choice for the largely ‘adversarial’ scheme of presentation (‘two-case model’) with some ‘inquisitorial’ inclusions, to the ‘postmodern suspense’ and uncertainty embodied in the ICC regime, whereby the shaping of the presentation sequence and questioning modalities is almost entirely left to the judges (the ‘indeterminate’, or ‘variable model’). Yet, this was followed by the new constructive phase and bolder experiments of crafting the more definite and truly mixed and multi-geared models with a (potential for) a stronger ‘inquisitorial’ touch (SPSC, ECCC, and STL). This wave presents several procedural approaches to structuring the proof-taking stage, including the ‘one-case model’ (ECCC) and the ‘three-case model’ (STL). The conceptual fluctuation as to what model is the best for international criminal trials in light of their special institutional and legal circumstances has informed the process and outcome of the legislative process and reforms in the domain of procedure and increased the current diversity of approaches. The pluralism of international criminal procedure in this respect is so significant as to make the detection of common-ground standards to serve as the framework for the ‘normative theory’ international criminal trials a daunting challenge. The following sections provide a summary of the law and practice of the jurisdictions covered in the foregoing survey. They also identifying both shared and deviating standards in the three areas: the ‘gross’ order of presenting evidence, the ‘fine’ order and modes of examining witnesses, and the order and modes of presenting documentary and other non-testimonial evidence.

3.7.1 Order of presentation of evidence

With regard to the ‘gross’ order of presentation of evidence, the common denominator among the tribunals is the standard that each party has the right to call witnesses and to present evidence, in the order determined by the legal framework and/or the Trial

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915 For instance, in adopting the STL Rules, the STL judges were guided, among others by the Lebanese Code of Criminal Procedure: see Art. 28 (2) of the STL Statute; STL RPE Explanatory Memorandum, supra note 161, paras 2-3 (when legislating the Rules, the ‘Lebanese civil law system’ had to be considered next to the ‘model adopted in the international criminal tribunals’).
Chapter 10: Presentation and Examination of Evidence

That is as far as the legislative consensus extends: international criminal procedure is pluralistic in respect of the exact order in which evidence is to be presented.

While the IMT Charter prescribed a two-case and two-round structure of presentation (including the prosecutor’s and the defence’s rebutting evidence), the ad hoc tribunals included in their otherwise ‘adversarial’ presentation scheme a distinct phase for the evidence called by the Trial Chamber proprio motu and the information relevant to sentencing, under caveat that this default order may be altered by the Chamber in the interests of justice. The trial sequence before the SCSL largely imitates that of the ICTY and ICTR, save for the omission of the possibility for the defence to present evidence in rejoinder as well as of the last phase reserved for the information relevant to sentencing.

In an endeavour to clarify the statutory ambiguity with respect to the presentation sequence and in the implementation of their mandate of establishing the procedure for the conduct of trial, the ICC Trial Chambers adopted the presentation scheme which accommodates the evidence presented by the legal representatives of participating victims upon authorization by the court. While the ICC Statute and Rules foresee no possibility for the parties and participants to present evidence in rebuttal and/or rejoinder, the ICC’s case law has allowed it in certain circumstances. The SPSC presentation algorithm departed from the ICTY model in two significant respects: (i) the evidentiary phase before the Special Panels commenced with the judicial questioning of the accused and (ii) additional evidence relevant to sentencing could be heard only upon the decision that the accused is guilty. At the ECCC—the only jurisdiction with the trial style that is closer to the undiluted ‘inquisitorial’ scheme than any other court—it would be inapposite to speak of the ‘gross’ order of presentation of evidence as organized per party responsible for calling a specific witness. In the ECCC, all witnesses are summoned by the Trial Chamber, even if some of them may be proposed by the parties for inclusion on the witness list. The absence of the ‘case for the Co-Prosecutors’ and the ‘case for the accused’ entails the discretion of the Trial Chamber in structuring the proof-taking stage, subject to the rule that the accused shall be questioned first, upon which the Chamber shall hear civil parties, witnesses, and experts in the order deemed useful. Finally, in departure from the ICTY model and by analogy with the ICC presentation scheme, the STL Rules explicitly envisage a slot for the evidence called by the Trial Chamber at the request of the victims. The STL follows the ICTY model more closely in that it authorizes the prosecutor to lead evidence in rebuttal and the defence the evidence in rejoinder – although at the same time, in departure from that model, the STL Trial Chamber is to receive information relevant to sentencing only upon the finding of guilt.

Second, the ICTY, ICTR and SCSL jurisprudence has consistently endorsed the rule that the parties may apply for reopening of their case where they wish to introduce the earlier unavailable, ‘fresh’ evidence that could not have been obtained and known about before the close of their cases through the exercise of ‘reasonable diligence’. Notably, despite the fundamental differences between the ad hoc tribunals’ evidence-taking stage and the ECCC process at substantive hearing, Rule 87(4) of the ECCC IR contains a provision not too remotely analogous to ‘reopening’ in the ICTY, ICTR, and SCSL and providing a similar threshold standard for admission. As this practice is not precluded by the ICC procedural framework and the ICC Trial Chambers did not rule out allowing the parties to

916 Art. 24(e) IMT Charter; Art. 15(e) IMTFE Charter; Rule 85(A) ICTY, ICTR, and SCSL RPE; Art. 64(8)(a), 67(e) ICC Statute and Rule 140(1) ICC RPE; Rule 91bis ECCC IR; Rule 146(A) STL RPE.
917 Art. 24(e) IMT Charter.
918 Rule 85(A) ICTY and ICTR RPE.
919 Sections 33.1 and 39.2 TRCP.
920 Rules 90 and 91(1) ECCC IR.
921 Rule 146(B)(iii) and (v) STL RPE.
922 Rules 146(B) and 171(1) STL RPE.
lead evidence after the completion of their cases, this appears to be a shared standard in international criminal procedure.

Third, in all jurisdictions where victims participate in the trial proceedings (ICC, ECCC, and STL), their legal representatives of victims have been allowed to call witnesses and to present evidence going to the guilt or innocence of the accused on their behalf and to challenge its admissibility, subject to the authorization by the Trial Chamber. Indeed, the allowance of victim participation, and in such an extended form, is not yet entrenched as the overarching principle of international criminal procedure. But the law and practice in the more recent international and hybrid criminal jurisdictions attest to a clear tendency of allowing victims to participate in the process and, more specifically, in the evidentiary parts of it. This is an area in which international criminal practice is still developing.

This patchwork of regulations holds little hope for distilling any commonly shared standards besides the right of the parties to present evidence and the power of the Chamber to order (additional) evidence. Given the ‘constructive ambiguity’ of the ICC legal framework and the relatively consistent contours of its emerging trial practice, which has put premium of the multiple-case approach toward the presentation of evidence, the ICTY/ICTR algorithm generally and roughly reflects the middle-ground position in international criminal procedure, subject to caveats. This concerns, in particular, the non-mandatory and variable character of the standard providing for the second round of presentation – evidence in rebuttal and evidence in rejoinder (cf. ECCC, although the SPSC, ICC and STL do provide for these); the distinct phase for the evidence called by the victims or by the Chamber on their request (ICC, ECCC, and STL); and hearing information relevant to sentencing as a step in the evidentiary process (cf. SCSL, SPSC, ICC, and STL).

3.7.2 Order and modes of questioning witnesses

The sequence in which *viva voce* witnesses are to be questioned and the nature of questions through which evidence is to be elicited is, in a similar vein, not an issue on which international and hybrid criminal jurisdictions present a uniform picture. The Nuremberg and Tokyo Tribunals, the *ad hoc* tribunals and the SCSL, and the STL (under Rule 145(B) regime) expressly draw upon the common law tradition with respect to the modes of witness examination. The party calling a witness examines that witness in chief, upon which the opposite party cross-examines and, if need may be, the witness can be re-examined and further cross-examined by the respective parties, with the judges being empowered to pose questions at any time.\(^\text{923}\) However, this scheme falls short of being universally shared among the tribunals, let alone mandatory.

For example, despite the fact that the ‘model principles’ governing witness examination contained in ICC Rule 140(2) may embody the same logic of distinguishing between the modes of questioning depending on whether the witness is being examined by the party who has called her, these standards eschew the overt common law terms such as examination-in-chief, cross-examination, and re-examination. According to Rule 140(2)(c), judges may pose questions *before* or *after* questioning by the parties. Furthermore, the Trial Chamber could arguably deviate from Rule 140(2) ‘model principles’ in an individual case. Another example eroding the seeming uniformity of the regime for questioning witnesses in international criminal procedure is found in the tribunals in which testimony of witnesses generally—or as one of the available examination regimes—starts with questions posed by the Presiding Judge and other members of the bench (SPSC, ECCC, and STL).\(^\text{924}\) Thus, no order of questioning derives from a universally shared and normatively binding standard. Rather, the most widespread practice is for the party proposing the witness to examine him.

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\(^{923}\) Art. 24(g) IMT Charter; Art. 15(d) IMTFE Charter; Rule 85(B) ICTY, ICTR, and SCSL RPE; Rule 145(B) STL RPE.

\(^{924}\) Section 36.6 TRCP; Rule 145(A) STL RPE; Rule 91ibis ECCC IR.
first, followed by the questioning of the opposing party, with a possibility of the second round of questioning (re-examination and further cross-examination). Even in the jurisdictions adopting the two-case structure of trials and the notion of witnesses ‘belonging’ to the respective parties, this order does not apply (fully) to witnesses called by the Trial Chamber. Such witnesses are commonly first questioned by the Chamber itself, then by the prosecutor, and subsequently by the defence, which is to have the benefit of questioning the witness last, as recognized in ICC Rule 140(2)(d).

The procedural frameworks of those tribunals, which distinguish between the various modes of questioning available to the party calling the witness and to the other party (ICTY and ICTR, ICC, and STL), also provide for the parameters of respective examination modalities such as admissible subject-matter and the nature of questions. But the respective model is not adopted by all jurisdictions surveyed and cannot be deemed as a mandatory in the broader context of international justice. Even in relation to the courts in which a strict distinction between examination-in-chief, cross-examination, and re-examination is drawn, some of the more tribunal-specific standards governing the modes and scope of questioning qualify the seeming uniformity.

First, the party calling the witness —where witnesses are proposed by the parties—shall be allowed to examine the witness in chief. During examination-in-chief, the Chamber will normally disallow leading and closed questions on disputed matters because such questions are aimed at undermining credibility and do not enable the court to appreciate the probative value of the answers given. Such questions may nevertheless be permitted where the witness has been declared ‘hostile’ by the party who has called her. Second, the party which has not called the witness may conduct further questioning, or cross-examination, on a range of matters, including the subject-matter of the initial examination, matters affecting credibility, the subject-matter of its own case, and any additional matters authorized by the Chamber. On disputed matters, leading, closed, and similar questions are not precluded. Where the witnesses is able to give evidence relevant to the case for the cross-examining party, counsel is under a duty to put to that witness the nature of his case which is in contradiction of the witness’s evidence. The same witness may then be re-examined by the calling party on the issues arising anew from the cross-examination and further cross-examined on the issues arising from the re-examination, subject to the Chamber’s leave. In respect of the types of questions that may be posed, the rules on examination-in-chief and cross-examination apply respectively and

In the courts allowing for victim participation, the tendency has consolidated to endow them with the conditional right—whether of statutory origin or developed through jurisprudence—to examine witnesses called at their request or at the request of the parties. As attested by the ICC and ECCC practice thus far, the primary rationale of such questioning is to assist the Chamber in establishing the truth. As regards the timing for judicial questioning, there would have been a universal consensus between the courts and tribunals that no such limits exist, if not for ICC Rule 140(2)(c) which entitles the judges to pose their questions to a witness before or after the party’s examination. However, since the scope of the judicial power to question witnesses has been interpreted broadly in the ICC jurisprudence, there is sufficient comparative basis to ascertain uniformity among the tribunals with regard to the principle that judges may at any stage put any question to the witness as deemed necessary for the establishment of the truth.

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925 Art. 24(g) IMT Charter; Art. 15(d) IMTFE Charter; Rule 85(B) ICTY, ICTR and SCSL RPE; Rule 140(2)(a) ICC RPE; Rule 145 STL RPE.
926 Rule 90(H) ICTY RPE and Rule 90(G) ICTR RPE; Rule 140(2)(a) ICC RPE; Rule 150(I)-(K) STL RPE.
927 Rules 69(3) and 91(3) ICC RPE; Rule 91(2) ECCC; IR Rule 87(B) STL RPE.
928 Art. 17(a) and 24(f) IMT Charter; Art. 11(a) and 15(f) IMTFE Charter; Rule 85(B) ICTY, ICTR, and SCSL RPE; Rule 91(2) ECCC IR.
Finally, there are at least two more commonly shared standards regarding the modes of questioning among international and hybrid procedural systems. The first is the standard which vests in the Trial Chamber the power and duty to ‘exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time.’ The second principle derives its force from the former and has been firmly established in the practice of all courts without exception: the parties and/or participants shall refrain from long, compounded, or repetitive questions.

3.7.3 Order of presentation of documents

No uniform and mandatory standards can be distilled from the law and practice of the international and hybrid criminal courts with respect to the means of submission of non-testimonial evidence such as documents and exhibits. In the jurisdictions such as the ICTY, ICTR, SCSL, and ICC, two main forms of presentation have been recognized through jurisprudence: the submission through a relevant witness and submission from the bar table. The tribunals in question have expressed a preference for the submission of documents through a witness who can identify the document, given that it would provide the judges with a better understanding of the origin, context, and content of the document with a view to assessing its probative value and reliability. When seeking the admission of lengthy documents, the tendering party shall indicate the relevant passages sought to be introduced. However, in order to avoid calling witnesses for the sole purpose of presenting a document, the parties may be allowed to tender the document not through a witness. In any event, the admission of the exhibit is subject to the general admissibility requirements and the other parties or participants shall be given an opportunity to comment on it. No such specific forms of submission of documents have developed in the ECCC. Before the ECCC, the evidence, whether it is already contained in the case file or has been included by the parties in their Rule 80(3) lists of proposed evidence, should be read out or summarized, or its contents should be identified in court, in order for the documents to be entered into the trial record. However, the rule demanding that a party identify the passages of lengthy documents sought to be admitted and the general requirement that the proposed document must satisfy the admissibility threshold, apply fully and have been reaffirmed in the ECCC practice.

4. EVALUATION

4.1 Fairness perspective

4.1.1 Order of presentation

Human rights law does not lay down any requirements regarding the order of presentation of evidence in a criminal trial beyond the general entitlement of an accused to a fair and public hearing. Generally, the jurisprudence of the ECtHR defers to the member states in the matters regarding the admissibility of evidence. It is silent as to whether the fact-finding

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929 Art. 18(a), (b) IMT Charter; Art. 12(a), (b) IMTFE Charter; Rule 90(F) ICTY, ICTR, and SCSL RPE; Regulation 43 ICC Regulations of the Court; Section 36.7 TRCP; Rule 91bis ECCC IR; Rule 150(G) STL RPE.
930 Rule 89(D) ICTY, ICTR RPE; Art. 69(3) and (4) ICC Statute; Rule 87(3) ECCC IR; Section 37.1 TRCP.
931 Art. 14(1) ICCPR; Art. 6(1) ECHR; Art. 8(1) ACHR; Art. 10 UDHR.
932 E.g. Van Mechelen et al. v. Netherlands, Judgment, Applications nos. 21363/93, 21364/93, 21427/93 and 22056/93, ECtHR, 23 April 1997 (‘Van Mechelen et al. v. Netherlands judgment’), para. 50 (‘the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them’); Doorson v. the Netherlands, Judgment, Application no. 20524/92, ECtHR, 26 March 1996 (‘Doorson v. the Netherlands judgment’), para. 67; Kostovski v. the Netherlands,
arrangements that meet the international fair trial standards should emulate the common law trial style with its sequencing of alternating evidentiary blocks for each party or amount to a judge-driven factual inquiry without bifurcation into two partisan cases. 933 That said, certain fundamental guarantees in the human rights treaties exert effects on the ‘gross’ structure of trial presentation. For example, the privilege against self-incrimination and the right to be presumed innocent until proven guilty entail that the accused may in principle refuse to present any evidence or participate in the evidentiary process as a consequence of the right to silence. 934 Where the presentation of evidence proceeds in alternating blocks per party, it is the party with the burden of proof (the prosecution) that shall present its evidence first in order to put forward the case for the accused to answer and to enable him to decide what evidence he will present, if at all. But the said privilege and the presumption of innocence do not per se require that all evidence be presented in distinct cases for the prosecution and for the defence, given that alternative presentation schemes can operate without infringing those guarantees.

Human rights law emphasizes the importance of the right of the accused to present evidence on his behalf under the same conditions as the prosecution and to confront the incriminating evidence. 935 The Human Rights Committee has held that the provision of Article 14(3)(e) of the ICCPR is ‘designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution’. 936 In interpreting Article 6(3)(d) of the ECHR, the ECtHR clarified that the Article does not grant the accused an unlimited right to secure the appearance of witnesses in court and that it is normally for the domestic court to decide whether it is necessary to hear a witness. 937 In any event, under the principle of equality of arms, which is not explicitly recognized but implied in Article 6 of the ECHR, every party must be afforded ‘a reasonable opportunity to present his case in conditions that do not place

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933 Cf. Prlić et al. documents in cross-examination trial decision (n 74), para. 19. See also S. Maffei, The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses (Groningen: Europa Law Publishing, 2006) 94-5 (‘no well-rounded up model for the administration of testimonial evidence in criminal proceedings could result from the to-do and not-to-do instructions of the Strasbourg organs.’).

934 Art. 14(2) ICCPR; Art. 11(1) UDHR; Art. 6(2) ECHR; Art. 8(2) ACHR; Art. 7(1)(b) ACHPR.

935 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’; Art. 6 (3) of the 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. 8(2) ACHR (‘During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: … (f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.’).


him at substantial disadvantage vis-à-vis his opponent'.

In particular, this imposes the duty on the court to ensure equal treatment of the parties when calling and hearing prosecution and defence witnesses. These guidelines do not disturb the general neutrality of the human rights law with respect to the sequencing of trial presentation.

In a similar vein, the right to an adversarial trial as developed in Strasbourg jurisprudence and defined by the ECtHR as the right to evidence being produced 'at a public hearing, in the presence of the accused, with a view to adversarial argument',

does not necessarily entail the obligation to structure the trial proceedings in a common law fashion. Trials adopting the continental style in which judges have a dominant role in the evidentiary process but parties nonetheless participate in the examination of evidence by way of procédure contradictoire do satisfy the ‘adversarial requirement’ under the Convention’s case law.

One issue regarding the structure of the proof-taking stage of trial that requires attention from a human rights perspective is the ICTY and ICTR practice of allowing no separate sentencing hearings upon conviction. The divergence between the ad hoc tribunals, on the one hand, and the SCSL, ICC, and STL on the other evinces the controversial character of the requirement that the defence must submit the information relevant to the determination of a sentence prior to conviction. The ICTY and ICTR judges’ decision to abandon separate sentencing hearings except for non-contested cases has been criticized from the perspective of a fair trial. Arguably, the unitary procedure is incongruent with the right to remain silent and the privilege against self-incrimination as well as the presumption of innocence, inasmuch as it conflicts with the defence strategy of denying the guilt of the accused and seeking acquittal.

This position is often adopted whenever a defendant pleads not guilty and opts for trial in order to contest the charges. As a result of the merging of the trial and sentencing phases, the defence is faced with a dilemma. On the one hand, it is expected to submit the information relevant to the determination of a sentence that presumes the possibility of conviction whilst this is not what the defence is pleading.

From the perspective of the defence, it may be difficult for the judges to disregard the defence’s submissions in mitigation of a possible sentence and the prosecution evidence in aggravation that are irrelevant for the determination of the guilt, when reaching the verdict. The ICTY

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940 Barberà, Messegué and Jabardo v. Spain, Application No. 10590/83, ECtHR, 6 December 1988, para. 78.

941 J.D. Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment of Legal Systems’, (2005) 68(5) Modern Law Review 737, at 753 (in the ECHR regime, an endeavour was made ‘to “translate” the defence rights prescribed in Art. 6 into a vision of adversarialism that was as compatible with the continental notion of une procédure contradictoire as with the common law adversary trial.’


943 Delalić et al. trial judgement (n 166), para. 1214 (‘the Defence is presumed in its evidence in mitigation to assume that the accused has been found guilty of the offence.’). See also STL RPE Explanatory Memorandum (n 161), para. 45.
has recognized that the Chamber must strike a delicate balance between the fair trial rights and the merged practice in order to prevent the prejudicial effects of receiving the sentencing submissions prior to conviction. On the other hand, should the defendant decide to fully exercise his right to silence and to refrain from addressing sentencing matters before the verdict, he will be unable to provide the Chamber with the relevant information to the detriment of his interests. Arguably, this also places the defendant at a serious disadvantage: the prosecutor is not as impeded in the same way in submitting the evidence on the aggravating circumstances alongside with the evidence going to the guilt, whether as part of his case or in the final trial brief.

On several occasions, the ICTY dismissed the defence’s challenges to the unitary scheme based on the ‘presumption of innocence’ argument. With reference to Rule 86(C) in particular, the Appeals Chamber rejected the claim that there was a clash between the right not to incriminate oneself and the submission of information going to the mitigation of the possible sentence. However, the issue is not as straightforward as has been presented. This can be inferred from the earlier jurisprudence of the Appeals Chamber in Tadić where it discussed retroactivity of the 1998 amendment that merged the trial process. The accused was convicted after trial conducted under the bifurcated regime, but after the Appeals Chamber added new convictions, it felt compelled to remand them for sentencing to the Trial Chamber because it believed that the retroactive application of the rule depriving the accused of a separate sentencing hearing would result in the prejudice to his rights:

In the particular circumstances of the case, the Appeals Chamber considers that the rights of the Appellant would be prejudiced if his appeal were to be determined under the new Rule. The Appeals Chamber will therefore follow the previous procedure in respect of the counts on which the Appellant was acquitted by the Trial Chamber but on which he is now found guilty.

Despite the intended objective of the amendment to expedite the process without jeopardizing the rights of the accused, the Appeals Chamber seems to have admitted that the merged procedure was to the detriment of the accused. However, because it referred to the ‘particular circumstances of the case’, it is not clear whether the Chamber actually meant that the procedure violates the rights of the accused generally, as opposed to choosing to apply a rule that is more favourable to the defendant.

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944 Delalić et al. trial judgement (n 166), para. 1214 (‘This is a very curious situation in which to place the Trial Chamber, which should avoid any prejudicial factors likely to affect the case of an accused presumed to be innocent. It is, in such a situation, somewhat complex to maintain the delicate balance between observance of the full rights of the accused, and the enforcement of the procedural rules relating to sentencing before convictions. The Trial Chamber is expected to disabuse from its consideration all prejudicial evidence in aggravation or mitigation, which would affect its determination of the guilt or innocence of the accused person.’).

945 But see Schabas, ‘Article 76’ (n 159), at 1415 (suggesting that prosecutor is also disadvantaged by the lack of separate sentencing hearings because the aggravating evidence such as the proof of bad character or of prior convictions may be held inadmissible at trial).

946 See further Chapter 11.

947 Judgement, Prosecutor v. Vasiljević, Case No. IT-98-32-A, AC, ICTY, 25 February 2004, para. 177 (‘an accused can express sincere regrets without admitting his participation in a crime’); Judgement, Prosecutor v. Brijanin, Case No. IT-99-36-T, TC II, ICTY, 1 September 2004, paras 1081, 1139 (with reference to the Vasiljević appeal judgement and the considered nature of the 1998 amendments, the TC disagreed with the defence that ‘as a result of the application of Rule 86(C) the Accused is forced to give up his right against self-incrimination in order to present evidence to his sentencing.’).

948 Judgement, Prosecutor v. Tadić, Case No. IT-94-1-A, AC, ICTY, 15 July 1999, paras 27-8, 327(6) (emphasis added.)

949 But note that the Delalić et al. TC did apply the unitary regime retroactively: see n 166.

950 Discussing this case law, see G. Acquaviva, ‘Single and Bifurcated Trials’, in Sluiter et al. (eds), International Criminal Procedure 536 (‘While significant, this statement is, however, still very vague and does
Indeed, the ICCPR and ECHR and the relevant jurisprudence do not directly address the need for separate sentencing hearings upon conviction, as opposed to the scheme under which the court receives evidence and submissions relevant to the determination of an appropriate sentence. Being a matter of admissibility of evidence that is within the ‘margin of appreciation’ of states, this aspect of the trial scheme is left to the states to determine in accordance with their procedural tradition. However, the fact that the accused has either to plead in mitigation of the possible future sentence and thereby undermine his claim of innocence prior to conviction, or to face the consequences of missing the opportunity to make tailored submissions and accept that he might receive a higher sentence as a result does arguably not ensure the best possible protection of the right to silence and the presumption of innocence under the statutes of the tribunals.\(^951\) The right not to be compelled to testify against oneself or to confess guilt becomes a qualified one where the defendant has to make the choice between consistently contesting guilt prior to the verdict and submitting the information that might mitigate the sentence in the event that he is convicted. On a related note, this right precludes the court from drawing inferences from the silence of the accused. But a failure of the defendant to make submissions on the factors in mitigation of the sentence (e.g. remorse) are impossible for the court to disregard, which is likely to affect the calculation of the sentence.\(^952\) The inclusion in the presentation sequence of the step for the submission of the information relevant for the determination of the sentence does not directly encroach upon the right to a fair trial. However, the alternative of allowing the person to plead separately with respect to the sentence, if and when he has been convicted, is preferable in light of the right against self-incrimination.\(^953\)

4.1.2 Order and modes of questioning

With regard to the order and modes of questioning, the accused is guaranteed the right to examine or have examined the witnesses against him and to obtain attendance and examination of witnesses on his behalf under the same conditions as prosecution witnesses.\(^954\) Although this resembles the right to cross-examine prosecution witnesses,\(^955\) the ECtHR case law expresses no preferences for either an ‘adversarial’ or an ‘inquisitorial’ manner of questioning witnesses in a criminal trial. According to John Jackson,

> the adversarial principle of defence examination of witnesses has been accommodated by the European Court to meet continental processes without too much disturbance. Although the right to examine witnesses would seem to have stretched the continental notion of une \textit{procédure contradictoire} beyond its traditional boundaries, this right has not required any full scale transition towards a party-controlled trial.\(^956\)

While, as noted, the evidence incriminating the accused must normally be produced in a proceeding that allows an ‘adversarial argument’, the exceptions to this principle may be accepted provided that they do not infringe the right of the accused to an adequate and proper opportunity to challenge and question witnesses against him when they testify or at a

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\(^951\) Art. 21(3) and (4)(g) ICTY Statute; Art. 20(3) and (4)(g) ICTR Statute.

\(^952\) Developing this argument, see Acquaviva, ‘Single and Bifurcated Trials’ (n 950).

\(^953\) See \textit{ibid.}; Schabas, ‘Article 76’ (n 159), at 1415 (‘Providing the accused with the right to a separate sentencing hearing, where new evidence and submissions may be presented, thereby enhanced the right to silence of the accused at trial.’).

\(^954\) Art. 6(3)(d) ECHR; Art. 14(3)(e) ICCPR; Art. 8(6) ACHR.


\(^956\) Jackson, ‘The Effect of Human Rights on Criminal Evidentiary Processes’ (n 941), at 756.
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later stage.\textsuperscript{957} For example, such exceptions may arise where there is a need to preserve the anonymity of witnesses in order to ensure their safety and well-being.\textsuperscript{958} However, any handicaps under which the defence labours should to some extent be counterbalanced by the court.\textsuperscript{959} The accused should not be prevented from testing the reliability and credibility of anonymous witnesses.\textsuperscript{960} No conviction should be based solely or to a decisive extent on the anonymous statements or witness depositions that the accused has not had an opportunity to challenge.\textsuperscript{961} Therefore, Article 6 (3) (d) of the ECHR renders the possibility of cross-examining witnesses whose evidence was not adduced before the trial court mandatory where their testimony played a main or decisive role in securing conviction.\textsuperscript{962} Inasmuch as the accused has an adequate and proper opportunity to challenge the evidence against him, the procedural arrangements of the examination process are not an issue.

The principle of equality of arms is relevant for the issue of questioning sequence and modes insofar as the accused must be provided with an opportunity to examine or to have examined the prosecution witnesses under the same conditions as witnesses on his behalf. This might mean inter alia that where the witness is consecutively questioned by the parties, the defence is entitled, at least, to the same number of turns in questioning as the opponent has to question the witnesses for that party. This matter arose in the ICTY’s Ćelebići case in which one of the accused contended that by refusing him to conduct a ‘further cross-examination’ after the re-examination by the prosecutor of its witness constituted a violation of the principle of equality of arms and of Article 21(4)(e) of the Statute.\textsuperscript{963} As noted, the Trial Chamber dismissed this argument, referring to Rule 85(A), as opposed to Rule 85(B), as embodying a ‘clear equality of arms’ in relation to the presentation of evidence. Insofar as the defence may present its evidence in accordance with Rule 85(A), it does not have an absolute right to re-cross-examine, given that no such right is extended to the prosecutor whenever defence witnesses are heard. Thus, the defence has equal right to those of the prosecutor to examine-in-chief and re-examine its witnesses.\textsuperscript{964}

One distinct human rights issue that has arisen from the discussion of the practice at the ICTY and ICC, is the scope and modalities of judicial questioning.\textsuperscript{965} The fundamental human rights guarantee relevant in this context is the right of the accused to an independent


\textsuperscript{958} Doorson v. the Netherlands judgment (n 932), para. 70-1; Van Mechelen et al. v. Netherlands judgment (n 932), para. 52.

\textsuperscript{959} Kostovski v. the Netherlands judgment (n 932), para. 43; Doorson v. the Netherlands judgment (n 932), paras 72-76; S.N. v. Sweden judgment (n 937), para. 47; Krasniki v. the Czech Republic judgment (n 937), para. 77; Bocos-Cuesta v. the Netherlands, Judgment, Application No. 54789/00, ECtHR, 10 November 2005, para. 69.

\textsuperscript{960} Delta v. France, Judgment, Application No. 11444/85, ECtHR, 19 December 1990, para. 37; Kostovski v. the Netherlands judgment (n 932), para. 42.

\textsuperscript{961} Doorson v. the Netherlands judgment (n 932), para. 76; Van Mechelen et al. v. Netherlands judgment (n 932), paras 54-55; A.M. v. Italy judgment (n 957), para. 25; Mild and Virtanen v. Finland judgment (n 957), para. 42; Unterpertinger v. Austria, Judgment, Application No. 9120/80, ECtHR, 24 November 1986 (‘Unterpertinger judgment’), para. 33.

\textsuperscript{962} Krasniki v. the Czech Republic judgment (n 937), para. 78, referring to Delta v. France judgment (n 960), para. 37; Asch v. Austria judgment (n 957), para. 28; Artner v. Austria, Judgment, Application No. 13161/87, ECtHR, 28 August 1992, paras 22-24; and Saïdi v. France judgment (n 957), para. 44.

\textsuperscript{963} Delalić et al. decision on presentation of evidence (n 66), para. 29.

\textsuperscript{964} Ibid.

\textsuperscript{965} See supra 3.2.2.F and 3.3.4.F.
and impartial tribunal established by law\textsuperscript{966} and, in particular, its ‘impartiality’ prong. Insofar as questions posed to witnesses by the judges might confer an advantage on one or other of the parties, it is not unlikely that contentions about the lack of impartiality will be put forward by the party placed at a real or perceived disadvantage by the judge’s questions. The related matter is the role and participation of the judges in questioning, including their comments on and reactions to the answers given by a witness, which could equally lead to allegations of bias. In the ECtHR case law, ‘impartiality’ is generally defined as the ‘absence of prejudice or bias’\textsuperscript{967} It incorporates ‘objective’ and ‘subjective’ aspects.\textsuperscript{968} The former requires that the judges have ‘an impartial state of mind’ when hearing a case and the latter that they are perceived by a ‘reasonable observer’ or ‘ordinary citizen’ to do so.\textsuperscript{969} In case of judicial questioning, it is the second, subjective, aspect of impartiality in particular which is at stake.

Importantly, neither the human rights conventions nor the case law qualify or limit the nature and number of judicial questions or establish a certain manner and length of judicial questioning as parameters of (the lack of) impartiality. The leading role of judges in examining witnesses such typical of continental criminal trials does not automatically entail a violation of the right to be tried by an impartial tribunal. Only if the questions or responses to answers coming from the bench show bias perceivable by a hypothetical ‘reasonable observer’ as demonstrating the lack of impartiality, would such courtroom transaction be caught by Article 6(1) ECHR. Therefore, the rule that judges may ask any questions at any time during the trial is not problematic in light of the right to an impartial tribunal. Rather, it is a procedural means by which judges carry out their fact-finding functions.

### 4.1.3 Presentation of documentary and physical evidence

No conclusive directions can be derived from international human rights law regarding the order and manner of submitting documentary and other evidence to a criminal court, given that the issue is largely governed by the rules on admissibility falling within the ‘margin of appreciation’. As noted, the jurisprudence of the ECtHR leaves the issues of admissibility of evidence to individual states.\textsuperscript{970} Indeed, it is only mandatory as per Article 6(3)(d) that the accused be given an ‘adequate and proper’ opportunity to challenge such evidence.\textsuperscript{971} Hence, the practice of the tribunals of allowing the submission of documents through a witness or from a bar table, as well as by way of reading, summarizing, or identifying the contents of the documents in court, is not inconsistent with the international human rights standards, provided that the other party is given a reasonable opportunity to comment on and challenge their contents.

\textsuperscript{966} Art. 14(1) ICCPR (‘hearing by a competent, independent and impartial tribunal established by law’); Art. 6 (1) ECHR (‘independent and impartial tribunal established by law’); Art. 8(1) ACHR (‘a competent, independent, and impartial tribunal, previously established by law’).

\textsuperscript{967} Piersack v. Belgium, Judgment, Application No. 8692/79, ECtHR, 1 October 1982, para. 30. See also Karttunen v. Finland, Views, Communication No. 387/1989, HRC, U.N. Doc. CCPR/C/46/D/387/1989 (1992), para. 7.2 (‘“Impartiality” of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.’)


\textsuperscript{969} E.g. Bellos v. Switzerland, Judgment, Application No. 10328/83, ECtHR, 29 April 1988, para. 67.

\textsuperscript{970} Schenk v. Switzerland, Judgment, Application No. 10862/84, ECtHR, 12 July 1988, para. 46 (‘Article 6 of the convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such [which is] primarily a matter for regulation under national law.’).

\textsuperscript{971} Kostovski v. the Netherlands judgment (n 959), para. 41; Unterpertinger v. Austria judgment (n 961), paras 31-33.
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4.2 Teleological perspective: Institutional goals

The experience of improvising and reforming trial procedure in international and hybrid criminal courts accumulated in the past decades, may attest that neither a predominantly ‘adversarial’ nor ‘inquisitorial’ trial style is per se incompatible with the fundamental objectives of the enterprise of international prosecutions. Essentially, the teleological parameter (special goals of international criminal justice) cast no ready preference for one or the other set of fact-finding arrangements, being normatively neutral in this respect. Both the trial format in which the evidence is presented alternately by each party before an unengaged fact-finder and that in which the bench actively steers and participates in the examination of evidence that is not distinguished per originator but categorized thematically (within the present cohort of courts represented solely by the ECCC), can effectively promote the institutional goals of international criminal justice. These are clearly the assumptions on which the procedural edifices of the tribunals rest and on which these institutions operate on a day-to-day basis.

But the unqualified claim that all procedural arrangements are equally effective in promoting the tribunals’ professed objectives would risk ignoring some of the possible incongruences between the procedures employed and those objectives. Originating in the national practice and rehearsed in a distinct institutional setting of international criminal tribunals, those arrangements may not always be the most appropriate or self-evident means for promoting the ultimate objectives. It must be kept in mind that the current structure of international criminal trials and modes of examining evidence before the Trial Chamber did not stem from a principled inquiry, empirical research, or a normative reflection aimed at devising the optimal and most efficient procedures tailored for international justice. A wholesale deconstruction of the present approach toward the organization of the proof-taking stage of international criminal trials will not be attempted here. But some of the perceived inconsistencies between the procedural forms and the ultimate objectives cited in the literature will be pointed out. In case of an obvious value conflict or a systematic failure of any given procedural form to heed to and respect the ultimate objectives of international criminal justice, this discussion might lead to suggestions to fine-tune the present arrangements and indicate the possible avenues for legislating on and reforming international criminal procedure in the future.972

First, the binary structure of presentation which entails the bifurcation of the trial into prosecution and defence phases and the categorization of all witnesses into those appearing for either one or the other party, has been regarded by some scholars as a factor unfavourable to the achievement of certain objectives of international criminal justice, due to its tendency of ‘polarization of issues’.973 It was contended that the fact that witnesses are called by partisan counsel who may substantively prepare them for the testimonial process, pushes witnesses into adopting the ‘partisan’ position of the respective counsel.974 Insofar as this may result in the silencing of important aspects of available evidence and in the emergence of a black-and-white account of controversial historical events, this set-up might not be ideal in light of the objective of establishing the truth and facilitating the creation of a credible historical record. According to Damaška,

When the contrary accounts are advanced by two self-interested individuals, to historians this is yet another drawback: they do not subscribe to the view that the ‘clash of bias and counter-bias’ favors truth-discovery—the more complex the investigated question, the more partisan polarization become a straightjacket to historians. … An increasing number of facts that are

972 On the ‘middle-ground’ approach rejecting the strong goal-determinism in relation to procedure, see Chapter 3.
973 Damaška, ‘Problematic Features of International Criminal Procedure’ (n 305), at 177.

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important to historical research remain unexamined, because they appear ‘neutral’—and thus uninteresting—in the beam of partisan lights.  

The correctional elements capable of neutralizing the adverse effects of the two-case approach on truth-finding (e.g. the power of judges to call evidence *proprio motu*) may be effective only to a limited extent. Furthermore, the binary logic of each party presenting its case, partly in response to the other party’s contentions and evidence, is apt to result in a fragmented and disjointed historical narrative of events. As compared to the thematical presentation under which the court and parties examine all material topics exhaustively and in turn, the case-by-case presentation is more likely to obscure important aspects and leave gaps in the historical record. While the judges may still glue the pieces of the puzzle together in their judgment, the two-case structure may arguably be less conducive to achieving factual coherence than the thematical approach to developing evidence at trial.

Within an adversarial system, one should consider the effect on the judges of the incriminating evidence being presented first. In the sequence of evidentiary presentations at trial, prosecution evidence constitutes an ‘organizing framework for the subsequent reception and processing of information’. Any misbalance resulting from the ‘first impression’ acquired as a result of the incriminating evidence being led first will not necessarily be remedied through the exercise of the judicial power to call evidence *proprio motu* where prejudicial views have already crept into the judges’ minds. In a similar vein, the prosecutor’s duty to collect and analyse evidence in an impartial manner, as established in Article 54(1)(a) of the ICC Statute, risks remaining theoretical in an adversarial context where the prosecutor’s primary role at trial is to oppose the defence.

In a similar vein, the rigidity of the ‘adversarial’ scheme of presentation may preclude the admission of material evidence, as a matter of principle, if it is proposed outside the party’s case-in-chief and at an inappropriate stage in the trial. In this sense, it arguably carries a truth-defeating potential. The need to ensure that judges have at their disposal a complete evidentiary basis for a judgment in the interest of an effective and accurate inquiry into facts may favour the reasonably flexible approach with regard to when and how evidence can be heard. This may call for the application of less stringent phase-driven admissibility criteria with regard to any additional evidence, so that they parties can corroborate and increment their cases in light with epistemic needs even after the close of their cases. It is important to consider, however, that this flexible approach, which is more in line with the ‘inquisitorial’ philosophy, increases the risk that the parties will investigate endlessly. Their inquiries might continue well into the trial phase and the parties would routinely seek to present additional witnesses and other evidence, which would need to be disclosed to and reviewed by the party. This is bound to result in delays and negatively affect the fairness and efficiency of proceedings as well as undermine the institutional goals.

From the perspective of the victim-servicing goal of international criminal justice, the bipolar structure of trial might also be considered to fall short of an optimal procedural arrangement, given the difficulty of accommodating the participation of victims other than as witnesses. The extensive participation of victims in trials, in particular the right to present, examine, and challenge the admissibility of evidence in court as well as to question witnesses, would disturb the exclusive prerogatives of the parties to offer evidence to the
court. As the practice of victim-participation courts evinces, the inclusion of victims in the evidentiary process comes with the cost—the impossibility to retain the classic two-case approach towards the presentation of evidence, given the need to reserve a step in the sequence for victims’ evidence—and has far-reaching effects for the nature of a criminal trial.

In relation to the goals of contributing to national reconciliation and communal healing and promoting human rights and rule-of-law values, the ‘adversarial’ scheme of case presentation has likewise attracted some criticism. That scheme is based on the expectation that litigants will defend their often radically opposed viewpoints on the individual criminal responsibility of the defendant (and therewith the contextual issues of history and conflict). The antagonistic two-case mode of developing evidence at trial is more likely to strengthen divisions within the target community and beyond than to extinguish them. Both symbolically and ideologically, the affiliation of witnesses with one of the parties—rather than with the neutral court—may be seen as a projection of the political struggle and ethnic hostility that erupted in a violent conflict that has led to the commission of the crimes, onto the courtroom litigation.\textsuperscript{799} The inherently confrontational character of the adversarial trials and the ‘spirit of hostility’\textsuperscript{980} between the counsel or between counsel and witnesses occasionally breaks through the customary (and deceptive) politesse. With the history and general background of the conflict being the issues at stake in the trial, this can too easily be associated with the animosities persisting on a macro-level within or between the communities and states. Whenever the supposed neutrality and pacific character of the courtroom discourse shows cracks in the critical moments of adversary examination aimed at impeaching witness credibility, this impression is only reinforced. The very principles on which the criminal proceedings operate could thus be seen by the constituencies as emitting a message contradictory to the one the courts were created convey.\textsuperscript{981}

Inherent in any party-led process is the risk of one party (especially a self-representing accused) using the courtroom, with relative success, as a forum for disseminating his particular vision of history or disseminating ideological views at odds with the human rights and rule of law ideals as part of his case.\textsuperscript{982} From this perspective, the idea of a criminal trial as a forum for establishing the ‘historical truth’ (or, rather, its ‘desirable’ interpretation) and propagating the ‘didactic’ messages better corresponds to the arrangement under which a single ‘case of the court’ is examined, which is associated with the ‘inquisitorial’ paradigm. Thus, an argument could be made that such paradigm is more aligned with the demands of post-conflict justice, including the nation-building and reconciliation within the war-torn societies and the teaching of effective rule-of-law lessons, than the adversarial paradigm.\textsuperscript{983} It is not difficult to notice that this reasoning is paternalistic and overtly utilitarian. Again, it is based on an assumption that international criminal courts should directly pursue some didactic goals, claim monopoly on the truth, and teach historical and political lessons to the accused and a wider audience, instead of ‘merely’ enforcing international criminal law and delivering procedural justice, rather than definitive treatment of the complex issues of politics and history. Such assumption has been strong

\textsuperscript{799} Eser, ‘The “Adversarial” Procedure’ (n 5), at 226 (on that basis recommending ‘downgrading the “adversariality” of the proceedings’).
\textsuperscript{980} Ibid., at 219.
\textsuperscript{981} Damaška, ‘What is the Point of International Criminal Justice?’ (n 975), at 357 (pointing out ‘the desirability of relaxing the bipolar pressures that arise from proceedings organized as a contest of two partisan cases’ for the reason that ‘the clash of conflicting positions tends to relativize, or weaken, both—including the courts’ intended message.’).
\textsuperscript{982} Damaška, ‘Problematic Features of International Criminal Procedure’ (n 305), at 181 (‘By letting the accused mount his own case, the two-cases model also gives him ample opportunity to use the trial as a stage from which to propagate ideas that might be repugnant to human rights values.’).
\textsuperscript{983} Damaška, ‘What is the Point of International Criminal Justice?’ (n 975), at 357.
rejected in the previous Chapters. Moreover, this view ignores the need for the accused to fall back on the alternative versions of historical events when conducting his defence when these issues are relevant to the charges as pleaded by the prosecution. This is dangerously close to ascribing to the criminal process itself the function of spreading the ‘rule-of-law values’, and to measuring the success of the enterprise of international criminal trials by conviction rates or by whether a particular defendant (or a group of defendants) has been convicted or acquitted.

Finally, another structural issue that is relevant in light of the institutional goals is the ICTY and ICTR approach of limiting the submission of the information going to the determination of an appropriate sentence to one step in the presentation of evidence under Rule 85(A). As noted, this results from the removal of separate sentencing procedure from the ICTY and ICTR RPE in July and June 1998, respectively. Apart from the human rights problems, which were discussed above, the merged procedure has been criticized for being an obstacle to the development of solid sentencing jurisprudence. It was seen as a factor that reduced the ‘expressive effect’ of international sentencing, given the schematic treatment of these matters in consolidated judgments. Amidst the calls for the reinstatement of separate sentencing procedure, the merged trial process has remained the practice in the ad hoc tribunals.

At this juncture, it is apt to turn to the validity of the archetypal ‘adversarial’ modes of questioning of witnesses in light of the special goals of international criminal justice. It is possible to identify a number of conceptual tensions between the two. For example, consider the adversarial rules governing cross-examination, including the allowance made for leading and closed questions, and the possibility of declaring a witness ‘hostile’ in case he unexpectedly provides evidence that is unfavourable to the party that has called her. Such questions pursue no other objective that confusing and impeaching the witness regardless of the actual truthfulness of her testimonial account. When considered in light of the goal of establishing the truth, these features of adversarial process could be counterproductive. The parties are likely to be unwilling to call a witness that might turn hostile, in the first place, and it is not always the case that the court will be in a position to identify such a witness on its own in order to summon him. Likewise, the relevance of the well-known common law position that cross-examination is ‘the greatest legal engine ever invented for the discovery of truth’ has come to be indirectly questioned in the context of international criminal procedure. For example, as noted, the Lubanga Trial Chamber recognized that neutral questioning is generally better suited to the discovery of the truth than the more combative techniques of eliciting evidence.

Furthermore, the adversarial system’s (qualified) indulgence for, and encouragement of, the challenging examination of witnesses by opposing counsel by means of the cross-examination technique has been deemed hard to reconcile with the institutional objective of vindicating the victims’ legitimate interests. Given the purposes of cross-examination, defence counsel will often seek to challenge the victim-witness’s account of events by trying to undermine his or her credibility. Many victims tend to perceive the cross-examiner’s probing questions as bordering on personal insult and the expression of disrespect towards

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984 See Chapters 3 and 5.
985 Supra 3.2.1.F.
986 R. Sloane, ‘Sentencing for the “Crimes of Crimes”: The Evolving “Common Law” of Sentencing of the International Criminal Tribunal for Rwanda’, (2007) 5 JICJ 713, at 734; Acquaviva, ‘Single and Bifurcated Trials’ (n 950), at 536 (‘the main difference between the guilty plea procedure and an ordinary trial, then, is clearly the additional care with which sentencing factors are evaluated in the former as opposed to the latter.’).
988 See supra n 249.
989 See supra 3.3.4.E. (on the questioning by legal representatives of the victims).
990 Damaška, ‘What is the Point of International Criminal Justice?’ (n 975), at 342.
their traumatic experiences.\textsuperscript{991} This risk is exacerbated where the cross-examiner, due to excessive zeal or a lack of skill, asks unnecessary, repetitive, blatant, or otherwise inappropriate questions or goes as far as to argue with or criticize the witness under guise of questioning.\textsuperscript{992} Likewise, if one believes in the didactic objective of international criminal justice, the adversary as opposed to neutral questioning is likely to further polarize the cross-examining party and the witness. It is probably more apt to increase any gaps between the version of criminal incidents or background events as relayed in testimony and the alternative account of the same events vouched by the opposing party. It is unclear whether this debate can be settled in the court’s judgment to both parties’ satisfaction and what contribution, if any, cross-examination as an epistemic technique can make to the establishment of the forensic truth, let alone the broader objectives of historical truth-finding, peace-building, and national reconciliation.

It remains to address what the implications are of the foregoing observations about the optimal format of evidentiary phase of international criminal trials made from the perspective of special goals of international criminal justice. As noted, some scholars have relied on them to argue that the ‘adversarial’ mode of presenting evidence at trial should normally not be the first choice for the framers of international judicial institutions. If the architects of international criminal procedure had approached the procedural rule-making as a \textit{tabula rasa} theoretical exercise divorced from practical considerations and previous experiences, the reflection about the institutional objectives of international criminal justice and systemic efficiency, it is argued, must have led them to different choices. This position is premised on the idea that, on matters of international criminal procedure, it is methodologically appropriate to reason solely from the considerations about the ultimate objectives of the international criminal justice. As emphasized on several occasions above, this position is untenable.

Furthermore, it must be considered that the critique against a specific trial format that has been formulated in the literature is inspired by two decades of experience of international criminal adjudication largely based on the ‘adversarial’ model. Next to the fact that such experience is a mixed bag (i.e. not singularly negative), the question must be answered as to whether the existing alternatives are or may have been much more advantageous in the international justice context, before their decisive adoption can reasonably be advocated.\textsuperscript{993} From among the contemporary international and hybrid courts, only the ECCC has been equipped with an (almost) undiluted ‘inquisitorial’ trial scheme. But it is too early to judge whether that model is evidently superior to the ‘adversarial’ model as practiced, for example, in the \textit{ad hoc} tribunals or to any other models (e.g. the ICC or STL) in terms of its inherent ability to promote the institutional goals. Measuring the success or failure of the ECCC’s procedural model in this respect is inherently difficult due to the uncertainty as to whether they are attributable to the model itself or to other (institutional, political, financial) factors that inform the realities of the administration of criminal justice.

Therefore, it is as misleading as it is tempting to rely on any abstract and theoretical inadequacies of a specific procedure in light of the goals of international

\begin{footnotesize}
\begin{enumerate}
\item Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’ (n 305), at 109 (noting that some victims ‘seem to find their courtroom experience with its stress on legal subtleties anti-climactic and frustrating’).
\item Reporting such instances, see Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’ (n 305), at 104; \textit{id.}, ‘Rules of Procedure in Yugoslav War Tribunal’, (2001-2003) 21 Quinnipiac Law Review 761, at 766 (describing some of the questions asked by Balkan defence lawyers at cross-examination as ‘outrageously biased’ and ‘illegitimate’).
\item Recognizing the experimental impossibility to prove the ‘truth-finding’ superiority of the ‘inquisitorial’ model over the ‘adversarial’ one on the basis of one ‘sample case’: Eser, ‘The “Adversarial” Procedure’ (n 5), at 207.
\end{enumerate}
\end{footnotesize}
criminal justice in advocating reforms. However, the underlying considerations should not be taken at face value as their argumentative pull is inherently tenuous.\textsuperscript{994} They would not justify a wholesale reform of the procedure for the presentation of oral evidence in international criminal trials in an ‘inquisitorial’ direction, let alone converting it all at once into a pure ‘inquisitorial’ form. Considerably more experimentation and empirical research and analysis into the processes of justice and their long-term impact on the societies are required before even tentative conclusions can be reached on the ‘best’ procedure to meet the ultimate goals of international criminal justice.

4.3 Efficiency perspective: Streamlining and expediting practice

The adversarial mode of presenting of evidence has often been criticized not only in light of the special goals of international criminal justice, but also for its alleged proneness to prolong proceedings when transposed to that context. Occasional resentful statements to that effect can be found in the individual opinions of the judges hailing—unsurprisingly—from civil law jurisdictions.\textsuperscript{995} In particular, it was claimed that the typical ‘common law’ presentation scheme bears a higher chance of repetitive production of the same and/or corroborative information. The circumstances possibly contributing to that include the severality of presentation rounds (case-in-chief, rebuttal and rejoinder, and reopening of the case) combined with the complicated rules on which evidence may be presented during each round, the multiple regimes of questioning witnesses depending on what party calls the witness, and the proclivity of adversarial counsel to raise objections on each and every one of those issues during trial, even as a matter of tactics. The latter circumstance can especially be felt in international and hybrid criminal tribunals in which judges and counsel do not share the same legal culture. For example, this has been an issue for the ECCC to a greater extent than for the SCSL that, in view of various factors, drew both judges and counsel predominantly from the common law tradition.

A pronounced critic of the adversarial model of proof-taking in the context of international criminal proceedings, the former ICTY judge Albin Eser (Germany), pointed to the separation of the trial into the prosecution and defence cases as a factor responsible for lengthy proceedings. Namely, it entails the need for both parties to present evidence on ‘a plurality and variety of counts, each of which may furthermore cover numerous events’.\textsuperscript{996} The same commentator went on to state that the disadvantages of the binary structure are exacerbated by the possibility of the second round of presentation (rebuttal and rejoinder). The Trial Chamber’s overly liberal approach to admitting rebuttal evidence could result in the presentation of cumulative or tangential evidence and lengthen the trial. But the overly rigid approach would prod the parties, in particular the prosecutor, to attempt to introduce, as a matter of precaution, a significant amount of cumulative evidence during its case. This would also result in an overblown case-in-chief (particularly where the Trial Chamber does not trim the case sufficiently during the pre-trial).\textsuperscript{997} As explained previously, within the

\textsuperscript{994} Chapter 3.
\textsuperscript{995} See e.g. Dissenting Opinion of Presiding Judge Jean-Claude Antonetti Regarding the Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules, \textit{Prosecutor v. Prlić et al}., Case No. 04-74-T, TC III, ICTY, 27 November 2008, at 6 (lamenting that ‘[t]he excessive drawing out of this trial is due to the methodology employed by both the Prosecution and the Defence in presenting their cases. In civil law, this would have never happened and the trial would have already been completed. … In the system used by this Tribunal, which is a compromise of the two systems, the mutual excesses of the parties could be better controlled by the effective use of Rule 90 (F) without difficulty, and by the adoption of new guidelines based on the practice followed thus far.’).
\textsuperscript{996} Eser, ‘The “Adversarial” Procedure’ (n 5), at 214.
\textsuperscript{997} \textit{Ibid}., at 215 (‘if the prosecution has to take into account that, if it fails with one or two witnesses, it will be precluded from adducing further witnesses, the it will undoubtedly present several more witnesses in its case-
adversarial framework, the evidence is presented by the parties alternately and fragmentally, with each subsequent round of presentation being narrower than the previous one. Especially in international criminal trials, the temporal gaps between the fragments of the parties’ evidence concerning the same events may total months or even years. Given the impossibility of foreseeing which evidence will subsequently be led by the defence, the prosecutors tend to present as much evidence as possible.

The adversarial mode of proof-taking presupposes an active role of the parties at trial. It requires a solid preparation on the part of counsel and specialized skills in the adversarial technique of cross-examination, which are difficult to master on the job for lawyers coming from a non-common law background. Counsel with a civil law background may not be versed in the ‘art of cross-examination’ due to the different functions they serve in the domestic criminal procedural context. Consequently, they are likely to face greater difficulties in performing effectively before the tribunals which have adopted the ‘adversarial’ modes of examining witnesses, subject to a sophisticated set of rules and exceptions. According to former ICTY Judge Patricia Wald (United States), some of the Balkan-trained lawyers were ‘quick learners’, but ‘others are painfully awkward and unfocused on just what they are trying to accomplish’, which led them to ‘go off on tangents that are not always relevant to their case’. Moreover, many of defence cross-examinations can be seen by an experienced common law practitioner, judge and counsel alike, as ‘painfully unhelpful’ and even counterproductive in forensic terms as substandard examination has in practice led to resentment and uncooperativeness of witnesses.

It could be argued that the inevitable difficulties faced by counsel and witnesses coming from a civil law background when participating in adversarial-style trials before an international criminal tribunals militate against the entrenched adversarial set-up in international criminal procedure. However, abandoning it will not necessarily solve the problems arising from the absence of a common trial culture shared by all actors in the tribunals. Although this is reported to a lesser extent, common law practitioners hailing may have experienced no less difficulty when getting accustomed to, and operating within, the hybrid legal environment of ad hoc tribunals, let alone the more definite ‘inquisitorial’ settings such as the ECCC. In the tribunals with the ‘quasi-adversarial’ procedure, such as at the ICTY (which functions without the numerous exclusionary rules and adopts the managerial judging model), and in those with an open-ended set-up (ICC), common law counsel are also ‘strangers’. They may feel at least as uncomfortable about the elements of practice with which they are less familiar and which are at odds with their conceptions of procedural justice as civil law counsel. The frequency and nature of objections raised by common law counsel to the ‘alien’ procedural elements, e.g. the more active position of judges at trial and the regime for the admissibility of evidence, indirectly attest to a degree of unease and confusion about those elements.

The cultural disconnects do not necessarily mean that the current procedural design at any of the courts is inadequate in light of the expertise and knowledge of the key players at trial, or that far-reaching procedural reforms present the best way of addressing them and enhancing the effectiveness of counsel and other actors in the context of the process. The

in-chief in order to avoid the risk of foreclosure of evidence which would be deemed critical by the prosecution at the rebuttal stage of the proceedings.’.).

998 Ibid., at 219.
1000 Tochilovsky, ‘International Criminal Justice’ (n 999), ibid.
1001 Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’ (n 305), at 104-5; id., ‘Dealing with Witnesses in War Crime Trials’ (n 146), at 232 (noting also that ‘repeat performance by some, though not all, defense lawyers from civil law jurisdiction have shown marked improvement in the art of cross-examination’).
1002 Ibid.
more effective solutions lie beyond the domain of procedure and may include measures aimed at the acclimatization of procedural participants in the unfamiliar trial context such as the possibility of providing training in trial advocacy and in other matters, as need may be. Similarly, witnesses must at all times be familiarized with the legal and organizational context of trial prior to giving testimony.

The absence of a shared culture is noticeable among the judges too. The degree of proactive behaviour of the members of the bench when questioning witnesses and calling evidence *proprio motu* depends, to a significant degree, on the individual background of the judges. The rules providing for the respective judicial powers leave room for discretion and result in non-uniform practice. One remarkable example is the differences among the ICTY judges in allowing a degree of autonomy to the parties when conducting cross-examination. It was reported that common law judges tend to guard vigilantly the adherence by the parties to Rule 90(H). Common law judges tend to view its prong (iii), which authorizes the Chamber to allow inquiry into additional matters, as an exceptional and *ultima ratio* tool. But their civil law colleagues have demonstrated considerably more flexibility in allowing cross-examination under that prong. This is an extrapolation of varying approaches in domestic criminal justice systems on what procedural mechanisms are best suited for probing the evidence at trial.

Such diversity among the Trial Chambers of a single tribunal and in the broader dimension of international justice may appear undesirable insofar as it may reflect negatively on the legal certainty and foreseeability of court practice for the parties to the trial. But it is unclear whether the arguments in favour of uniformity are strong enough to propel the development of international criminal procedure towards the more pronounced and unambiguous normative choices. Even if so, and similarly to observation made in the context of ‘goals’ above, there is no reliable and convincing empirical—as opposed to impressionistic, intuitive, or speculative—basis to claim the ‘superiority’ of either the inquisitorial or adversarial model in relation to the order and modes of presenting evidence in terms of their inherent or proven efficiency in international criminal trials. It cannot be guaranteed that substituting the purely ‘inquisitorial’ unitary scheme for the ‘adversarial’ mode of presentation, with its ‘overcomplicated’ rules governing the examination of witnesses, would pay back in time-saving and procedural efficiency, thus making the far-reaching reforms worth the cost.

In fact, the only ‘inquisitorial’ experiment pioneered at the ECCC model is not apt to lead to any firm conclusions regarding the viability of that scheme. The more in-depth and balanced assessment of how well the ‘civil law’ model fares in the context of complex international crime cases adjudicated on an international level, as compared to the ‘common law’ model, requires a more extensive experience. Some first conclusions could be drawn had the ECCC completed the trial proceedings in Case 002 (*Nuon Chea and Khieu Samphan*). But at the time of writing only the first part of that trial (Case 002/01) has been completed and, along with the *Duch* process, it constitutes too limited an empirical basis for any far-reaching normative conclusions.

What has emerged to date in the Case 002 proceedings before the ECCC would rather tend to disprove the contention that the civil law approach is markedly more suitable for

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1003 For an empirical study on the differences in trial style adopted by ‘proactive’ and ‘reactive’ TCs at the ICTR and on the link between judicial styles and backgrounds, see Byrne, ‘The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice’ (n 303).

1004 Wald, ‘Dealing with Witnesses in War Crime Trials’ (n 146), at 232 (‘ICTY judges vary widely in the scope of cross-examination they allow. In one Chamber, housing a majority of civil law-trained judges, the attitude is pretty much “let it in” and “we’ll sort it out later”. Other chambers dominated by common law-trained judges are stricter in not letting cross-examination stray from the witness’ direct testimony. The ICTY Rule itself is somewhat ambiguous as the scope of cross-examination. … Some judges emphasize the first clause over the second, ruling frugally as to how far cross may go beyond direct, while others see the second clause as an open door to any hostile or leading questions that are arguably relevant to the case.’).
for dealing with international crime cases than its alternative. As noted, apart from splitting the trial into several mini-trials, the bulk of case management decisions in Case 002 has consisted in the delegation by the Trial Chamber of the primary responsibility for examining certain witnesses, civil parties, and experts to the relevant parties.\textsuperscript{1005} This is a retreat from the original ‘inquisitorial’ scheme towards a party-driven process. A faithful adherence to the former regime would have required the Trial Chamber to acquire intimate familiarity with the relevant aspects of the evidence under examination in order to be able to conduct primary questioning. But this would have put a tremendous strain on the Chamber’s limited resources. In the circumstances of a large and complex case, it can be impracticable or impossible for the judges to continue exercising the leading role in examining each and every single witness proposed to be heard at the substantive hearing. At least, this means that the ‘inquisitorial’ scheme will not necessarily be a panacea for the efficiency problem of international criminal trials. The ‘inquisitorial’ model may work relatively well in dealing with the accused who choose not to contest charges against them (as was the case in the Duch process) and yet begin to show cracks in cases where the accused employ the full arsenal of ‘adversarial’ procedure.

The final issue to be addressed from the efficiency perspective is the question of whether a merged trial procedure, whereby the court receives both the evidence as to the guilt or innocence and any sentencing submissions jointly prior to conviction, is conducive to expeditious proceedings. As noted, the considerations of efficiency had been the leitmotif for reverting to the single-trial model by the ICTY and ICTR judges in July and June 1998 respectively. It must be recognized that the practical relevance of a bifurcated procedure and the distinction between (exclusively) verdict-related and sentence-related evidence may be reduced in international criminal trials. These trials are conducted by the same bench of professional judges, who are assumed to be perfectly able to disregard any sentence-related circumstances immaterial to the verdict.

However, it is still legitimate to question to what extent the merged practice is as efficient as was assumed in the ICTY Fifth Annual Report (1998).\textsuperscript{1006} Thus, if the parties are compelled to call character evidence during the trial, this is apt to extend the trial without any efficiency benefits arising in the event of an acquittal.\textsuperscript{1007} As noted, the ICC Statute, which was being drafted exactly when the \textit{ad hoc} tribunals reverted to the singular trial scheme, contains a presumption that separate sentencing hearings will likely be held in most cases. It is unclear to what extent the considerations underlying the ICTY and ICTR reform towards the merged judgment and sentencing phases informed the Rome negotiators. But the most recent shift to the bifurcated scheme has certainly been well-considered. The latest trend in international criminal procedure, embodied in the STL procedure, is the explicit choice for bifurcation into trial and sentencing stages. The erstwhile proponent and, possibly, initiator of the 1998 reform at the ICTY and, over a decade later, an opponent of a merged trial scheme, late Judge Cassese, advanced arguments in support of the latter position. In his capacity as the STL President, he submitted that the ICTY/ICTR solution was mistaken, for the reasons that

(i) there may arise some confusion when Judges have to hear at the same trial stage both fact witnesses and character witnesses; and (ii) during trial, the Trial Chamber may have to hear many “character witnesses” concerning an accused even when it may ultimately decide to acquit that accused. In short, hearing character witnesses at a stage where the Court has not

\textsuperscript{1005} See \textit{supra} 3.5.2.

\textsuperscript{1006} See \textit{supra} n 157.

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yet formally decided whether to acquit or convict the defendant may prove to be a waste of time.\textsuperscript{1008}

Judge Cassese wished to dispel the myth that receiving both types of evidence simultaneously actually expedites the process. His second point that a separate sentencing procedure is bound to lead to more focused and effective, rather than hypothetical submissions on the sentence, is telling. Indeed, the person convicted of a crime can openly and fearlessly express contrition and repentance without risking to undermine his own plea of innocence in respect of the charges, and it is more likely that such repentance will be believable and taken into account as a mitigation factor. Similarly, in case of a multiple-charge indictment, the court may acquit on some charges and convict on others. Defence counsel will be in a better position to advance meaningful submissions assisting the court in calculating the sentence when both the convictions and the underlying factual reasoning are known.\textsuperscript{1009} If allowed to prepare and deliver such submissions at a sentencing hearing after the verdict is pronounced—and not as part of trial evidence, closing arguments, and final trial briefs—the defence would not be expected to second-guess the verdict likely to be entered on each charge and make superfluous submissions on charges on which a verdict of not guilty would eventually be issued.

4.4. Postscript on comparative law: ‘Non-parameter’ with a quasi-normative role?

It must be recalled that comparative criminal procedure was not given a status of a valid normative parameter for the purpose of a critical evaluation of the procedural form in international criminal justice.\textsuperscript{1010} But interestingly, it has transpired that the national approaches to structuring and regulating the detail of the evidentiary phase of criminal trials have indeed served international criminal tribunals not only as sources of inspiration, but also as building blocks in a very specific sense as the tribunals were engaged in the experiment of constructing their own approaches to ordering the presentation of evidence. In fact, the direct borrowing from national rules and practices has been a regular modality in the procedure-making in this area of practice and in judicial interpretations of the relevant matters. This aspect warrants a detailed more consideration as a part of the ‘normative theory’.\textsuperscript{1011} In particular, one may wonder whether comparative criminal procedure has occasionally played a quasi-normative role in international criminal procedure, serving the tribunals as a direct material source of principles and rules with regard to the sequencing and ordering of the proof-taking phase.

It is worthwhile adding several remarks here in anticipation of that discussion in order to demonstrate this point. It was only relatively early in the life of the ICTY, in the Čelebići case, that the court reproached the parties for the cavalier use of terminology in reference to the modes of examination, exhorting them to avoid terms not found in Rule 85(B) (‘direct examination’ and ‘re-direct examination’).\textsuperscript{1012} However, this rebuke was hardly underpinned by the notion that the modes of examination before the Tribunal were to be any different from those used at the domestic level. An occasional manifestation of legal purism, the Čelebići guideline was not faithfully followed, and the use of deviating language

\textsuperscript{1008} STL RPE Explanatory Memorandum (n 161), para. 45.
\textsuperscript{1009} Ibid.
\textsuperscript{1010} Chapter 1.
\textsuperscript{1011} Chapter 12.
\textsuperscript{1012} Delalić \textit{et al.} decision on presentation of evidence (n 66), para. 20 (‘The expressions direct-examination, re-direct examination and re-cross examination not being words used in the Rule are exotic and \textit{aliunde}, and they should not have been imported.’)
by both parties and the Chambers has been recurrent since. Arguably, this is explained by convenience and the lack of apparent differences between the modes of examination of witnesses employed before the tribunals and in common law. The perusal of the tribunals’ later jurisprudence attests that they have not shied away from drawing upon domestic practices for the presentation of evidence. They have demonstrated keenly awareness of which legal tradition has served as the primary source for their procedure and have interpreted the procedural rules in line with the domestic notions. For example, when rejecting the prosecution motion for reconsideration of the previous ruling not to admit material used at cross-examination during the defence case, the ICTY Trial Chamber recalled the adversarial origin of ICTY Rules 85 and 90(H). The Chamber stated that the ‘principal reason for [its] ruling … is that the Prosecution case has now closed and [the Prosecution] cannot seek the admission of material on a freestanding basis during the course of the Defence case to challenge Defence evidence.’ It is not difficult to notice that this reasoning is based on an uncompromised ‘adversarial’ logic according to which each item of evidence ought to be presented at an appropriate stage of the trial, rather than at a moment randomly chosen by the party. Similarly, in the search for guidance regarding the nature and scope of evidence in rejoinder pursuant to Rule 85(A)(iv), the ICTR observed that ‘[c]ivil law jurisdictions do not follow an adversarial process and therefore cannot provide any guidance … in relation to rejoinder’. It also found it useful to focus on the common law jurisdictions because there the sequence of the presentation of evidence at trial is subject to a rule that ‘the Prosecution bears the burden of proof and is not permitted to “split its case”.

The tribunals have explained their extensive reliance on the common law jurisprudence and commentary in interpreting the nature and scope of various questioning techniques by the need to ‘better understand the rationale’ of the rules subject to application, rather than by their normatively binding character. For example, when interpreting ICTY Rule 90(H)(ii), the Chambers started by acknowledging its origin in common law and openly relied on the classical Browne v. Dunn rule. In Kovačević, Judge Shahabuddeen cautioned against resorting to the national analogy as the ‘exclusive touchstone’ in determining how international trials are to be conducted and opined that ‘peculiarities and difficulties of unearthing and assembling material for war crimes prosecutions’ call for ‘judicial flexibility’. This position invites one to attach little normative value, if any, to comparative criminal procedure in the domain of international criminal procedure. Arguably, this points to its more pragmatic use attended by a degree of freedom and increasing emancipation of the tribunals from the normative baggage associated with the specific categories of domestic criminal procedure.

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1013 E.g. Prlić et al. cross-examination decision (n 254), para. 10; Transcript, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 17 November 2008, at 34634 (using the word ‘redirect’ on numerous occasions, which may well be the result of inaccurate interpretation from French).
1014 S. Milošević decision on reconsideration (n 111), para. 17.
1015 Ibid., paras 17 and 9 (‘If, by the witness’ response to questioning about a piece of potential evidence, the content of that potential evidence is not adopted, there is no way of introducing it without the Prosecution leading evidence of its own. This is something the Prosecution cannot do during the course of the Defence case, its case having closed.’) Footnote omitted.
1016 Semanza rejoinder decision (n 86), para. 4.
1017 Ibid.
1018 Brdanin and Talić Rule 90(H)(ii) trial decision (n 274), para. 12 (recognizing ‘the utility of referring to the standard case law from these jurisdictions in trying to understand the rationale of this Rule’).
1019 Separate opinion of Judge Shahabuddeen, Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998, Prosecutor v. Kovačević, Case No. IT-97-24-AR73, AC, ICTY, 2 July 1998, at 4-5 (cited in Delalić et al. reopening decision (n 71), para. 9.)
5. CONCLUSIONS AND RECOMMENDATIONS

This Chapter has provided an analysis of the law and practice of the tribunals in the area of the presentation of evidence at trial. It has identified both the commonly shared standards and a multitude of diverging rules of international criminal procedure relating to the sequence and modes of presentation of evidence and reviewed them in light of the parameters of fairness, institutional goals, and operational efficiency. This analysis does not reveal any strong normative considerations to justify a reform of the presentation scheme currently employed by international criminal tribunals in order to move it either in a more pronounced ‘adversarial’ or ‘inquisitorial’ direction. The normative criteria do not justify the disqualification of the practices currently in use. Thus, international human rights law is largely inconclusive as regards the order of the presentation of evidence in a criminal trial and provides states with a broad leeway in this regard. The order of evidence is solely subject to the requirements that the accused may (but must not be compelled to) present evidence and call witnesses under the conditions that do not put him at a disadvantage vis-à-vis the opponent. With regard to the modes of questioning, neither the neutral questioning such as found on the Continent nor the varied modes of examination typical of common law are inconsistent with the human rights treaties or the relevant jurisprudence. Nor is the fairness parameter averse to active and extensive judicial questioning of witnesses, provided that such questioning does not amount to a manifestation of bias or prejudice that would make it inconsistent with the right to be tried by an independent and impartial tribunal.

Secondly, the Chapter has shown that the consideration of the structure and organization of the proof-taking phase in light of the special goals of international criminal justice might indicate that the ‘adversarial’ trial model may not have been the self-evident choice. Scholars have identified a number of tensions between the goals of truth-finding, history-writing, reconciliation, and providing redress for the victims, on the one hand, and the key aspects of the adversarial mode of evidentiary presentation, on the other hand. Most notably, this concerns the inflexibility of the presentation scheme, undesirable polarization resulting from a bi-partite structure of presentation, the partisan ‘ownership’ of witnesses, the seemingly artificial limitations on the scope and nature of examination, and other hallmarks of the adversarial model. In the same category falls the overtly adversary nature of cross-examination, the abuse of which in the context of an international criminal trial may lead to disastrous consequences for the witnesses concerned and for the overall credibility and legitimacy of the trial system. However, the risks and disadvantages posed by this model are known better than those of its alternatives. Therefore, it is unclear whether the rules of ‘adversarial’ origin are per se incompatible with the special goals of international criminal justice and whether the civil law practices would generally fare any better in the context of international criminal trials. It is also far from certain that the adoption of an ‘alternative’ model, being essentially a ‘jack-in-the-box’ in the international criminal justice context, would be free from any tensions with the goals and from practical challenges in their effective operation.

In terms efficiency, the current set-up of the presentation of evidence and witness examination adopted in international criminal tribunals does not stand out as impracticable or unsustainable. Whilst some commentators have pointed to the tendency of the two-case approach and related rules regarding the examination of evidence to protract the proceedings, it is difficult to find incontrovertible empirical evidence that these features, in and by themselves, lead to delays. A plethora of trials before the tribunals have been conducted both fairly and expeditiously and were concluded within a reasonable period of time under the circumstances. The difference in performance between the ICTY and the ICTR, the former having a better record than the latter, can also be explained by the stronger institutional and pre-trial case management at the ICTY, rather than by any significant
divergences in their model for the presentation of evidence at trial. To a considerable degree, the negative side-effects of the party-led process, which has been blamed for the delays, can be neutralized by able and proactive intervention by the judges. The supposed advantages of the alternative model of receiving and testing evidence at trial are yet to be ascertained in practice and at present do not constitute a self-sufficient reason to revolutionize the currently predominant procedural scheme for presenting evidence in international criminal trials.

Finally, no specific recommendations can be entered as regards the ‘gross order’ of the live testimony and documentary evidence at trial, given the uncertainties regarding the optimal procedural model. But in the area of witness examination, there is normative support for molding the liberal regime of judicial questioning into the one that imposes on the judges the duty, at any stage, to put any question to the witness that they deem necessary for the establishment of the truth. In spite of Rule 140(2)(c) of the ICC Rules, which entitles the ICC trial judges to pose questions to witnesses before or after the witness is examined by the parties, the principle reflected in the law and practice of other international criminal jurisdictions is that judges may ask any question at any time if necessary for the establishment of the truth. Indeed, the ICC Rule was aimed at accommodating the common law concern about excessive judicial interference in the examination by counsel and reflects the uneasy compromise between the delegations representing different legal traditions. However, in the ICC regime, the said guideline is arguably non-mandatory and has been applied flexibly in practice thus far. As elsewhere, the ICC judges are not prevented from asking a witness material questions as they come up without necessarily having to wait until the examining counsel completes questioning.

Further, in order to enhance the truth-finding competence of the judges and to clarify their duties in this regard, it is recommended that this prerogative should be reformulated as a positive obligation to ask any questions as they deem necessary for the determination of the truth. This is subject to the requirement that the way in which this duty is exercised by the judges should not interfere with the discharge of the prosecution’s burden of proof or raise a reasonable perception of bias against the accused in violation of his or her right to an impartial tribunal. Such power is already inherent in the broad discretion exercised by the judges. An additional emphasis on the compelling nature of the truth-finding mandate of the Trial Chamber will clarify the terms on which it is to be exercised, without removing its discretionary nature, as attested by the qualification ‘as they deem necessary’. This clarification will arguably resolve questions and prevent objections occasionally raised by the parties when faced with more than minimal questioning of the witnesses by the judges. Currently, judicial discretion in this area is not formally governed by any uniform objective but is merely subject to the accidental and arbitrary factor of the background of individual judges. The lack of apparent legal or policy justifications for the pluralism of trial practice, in the presence of undesirable uncertainties, warrants the need for principled consensus and possibly greater harmonization in the sensitive area of practice.

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1020 See further Chapter 8.