The investigation phase in international criminal procedure: in search of common rules

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Chapter 5: Questioning of witnesses*

I. INTRODUCTION................................................................................................................ 435

II. DEFINING WITNESSES AND WITNESS STATEMENTS.................................................... 440

III. WITNESS STATEMENTS AS A SOURCE OF EVIDENCE: ADMISSIBILITY OF OUT-OF-COURT WITNESS-STATEMENTS ................................................................. 443

IV. APPLICABLE PROCEDURAL REGIME ............................................................................. 450

V. POWER AND APPLICABLE PROCEDURAL NORMS.......................................................... 454
  V.1. The ad hoc tribunals and the SCSL.................................................................. 454
  V.1.1. The power of the parties to interview witnesses .............................................. 454
  V.1.2. The power to compel witnesses to be interviewed ........................................ 454
  V.1.3. Procedural safeguards ..................................................................................... 460
  V.1.4. Statement taking modalities .......................................................................... 462
  V.2. The International Criminal Court ..................................................................... 468
  V.2.1. The power of the parties to interview witnesses .............................................. 468
  V.2.2. The power to compel witnesses to be interviewed ........................................ 469
  V.2.3. Procedural safeguards ..................................................................................... 472
  V.2.3.1. Privilege against self-incrimination ............................................................. 473
  V.2.3.2. Other procedural safeguards ..................................................................... 476
  V.2.4. Statement taking modalities .......................................................................... 477
  V.3. Internationalised criminal courts and tribunals .................................................... 480
  V.3.1. The power of the parties to interview witnesses .............................................. 480
  V.3.2. The power to compel witnesses to be interviewed ........................................ 484
  V.3.3. Procedural safeguards ..................................................................................... 485
  V.3.4. Conduct of the interview ................................................................................ 487

VI. INTERNATIONAL HUMAN RIGHTS NORMS ................................................................ 490
  VI.1. The privilege against self-incrimination for witnesses ....................................... 490
  VI.2. Right to examine witnesses .............................................................................. 492

VII. CHALLENGES OF INTERNATIONAL CRIMINAL INVESTIGATIONS ............................. 498

VIII. COMPARATIVE ANALYSIS: SOME TENTATIVE CONCLUSIONS AND RECOMMENDATIONS .......................................................................................... 507

I. INTRODUCTION

Witnesses need our careful consideration because they are the primary source of evidence in most contemporary international criminal proceedings. Consequently, the questioning of

* This chapter is an expanded and updated version of this author’s section ‘Questioning of Witnesses’ in K. DE MEESTER, K. PITCHER, R. RASTAN and G. SLUITER, Investigation, Coercive Measures, Arrest and
prospective witnesses, as an investigative measure, is of primary importance in the evidence-gathering process. For example, at the ICTY, by 2009, approximately ten thousand witnesses had been interviewed by the Prosecutor since 1994. This feature sets these proceedings apart from their post-WWII antecedents, which largely relied on documentary evidence.

While the importance of witness interviews for both parties in building their respective cases is easily understood, it is equally important to understand the various ways in which statements or transcripts resulting from these interviews play a role in further proceedings. Written statements taken from witnesses during the investigation phase can be tendered into evidence under certain conditions. Disclosure obligations may dictate the disclosure of witness statements depending on whom the Prosecutor or Defence intends to call at trial.
Witness statements or transcripts may also form part of the written summary of evidence which may be considered by the Single Judge when reviewing the charges or may be introduced as summary or documentary evidence at the confirmation hearing. 6

Nevertheless, at the outset of our discussion on the interrogation of witnesses as an investigative measure, it should be underlined that, in theory, the preference for oral evidence (or the ‘presumption of orality’) still stands in international criminal procedure. 7 Most

SCSL RPE as well as 73ter (B) (iii) (b) ICTR and SCSL RPE (the Trial Chamber or a Judge ‘may’ order the Defence and Prosecution to provide a summary of the facts on which each witness will testify. Note that originally, no obligation existed for the Defence to disclose witness statements, see e.g. ICTY, Decision on Prosecution Motion for Production of Defence Witness Statements, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch., 27 November 1996. Later, the Appeals Chamber held that defence witness statements can be subject to disclosure “only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure.” See ICTY, Judgement, Prosecutor v. Tadić, Case No. IT-95-1-A, A. Ch., 15 July 1999, par. 325 – 326.

6 Rule 47 (B) ICTY, ICTR and SCSL RPE and Article 61 (5) ICC Statute; see ICC, Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of the Deceased Witness 12, Prosecutor v. Katanga and Chui, Situation in the DRC, Case No. ICC-01/04-01/07-412, PTC I, 18 April 2008, pp. 4-5 (“when the Prosecution intends to rely on witnesses for the purpose of the confirmation hearing, it will normally do so through the use of their statements or the transcripts of their audio or video recorded interviews”).

7 Indications of the preference for viva voce witness testimony can clearly be found in Rule 90 (A) ICTR RPE (“Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71’) and, more indirectly, in Rule 89 (F) ICTY, ICTR and SCSL RPE. Before the 19th Revision of the ICTY RPE of 13 December 2000, the principle of orality was clearly stated in Rule 90 (A). In a similar vein, before the amendment of the SCSL RPE, Article 90 (A) explicitly included a preference for oral evidence. Consider ICTY, Decision on Prosecution’s Motions to Admit Prior Statements as Substantive Evidence, Prosecutor v. Limaj et al., Case No. IT-03-66-T, T. Ch. II, 25 April 2005, par. 29 (“Despite the amendments that have been made to the Rules with respect to the form of admissible evidence, oral evidence remains the primary and normal standard”); ICTY, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, Prosecutor v. Hallovic, Case No. IT-01-48-AR732, A. Ch., 19 August 2005, par. 16-17; ICTY, Appeals Chamber Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, Prosecutor v. Kapreškić, A. Ch., 15 July 1999, par. 18; ICTY, Decision on Appeal Regarding Statement of a Deceased Witness, Prosecutor v. Kordic and Čerkez, Case No. IT-95-14/2-A, A. Ch., 21 July 2000, par. 19; SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, T. Ch. I, 16 July 2004, par. 25 (“The Special Court adheres to the principle of orality, whereby witnesses shall, in principle, be heard directly by the Court”). In addition, the Appeals Chamber stated that the weight to be attached to hearsay, in the form of out-of-court witness statements will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined. See ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Prosecutor v. Aleksić, Case No. IT-95-14/1-AR73, A. Ch., 16 February 1999, par. 15. The preference for oral evidence by the ICC can be found in Article 69 (2) ICC Statute (“The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence.”). Confirming see e.g. G. ACQUAVIVA, Written and Oral Evidence, in L. CARTER and F. POCAR (eds.), International ‘Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems, Cheltenham, Edward Elgar Publishing, 2013, p. 108 (“International tribunals have undoubtedly heeded the European Court of Human Rights’ prescription that ‘all the evidence must normally be produced at a public hearing, in the presence of the Accused, with a view to adversarial argument’” … “in proceedings before international criminal tribunals – preference is currently given to oral evidence”); M. CAIANIELLO, First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?, in «Journal of International Criminal Justice», Vol. 9, 2011, p. 394. Nevertheless, this preference does not apply to the ICC confirmation hearing: see Article 61 (5), second sentence ICC Statute. 437
international criminal tribunals reviewed in principle require witness statements to be given orally, in the courtroom setting. This preference follows from the principle of best evidence and the preference for primary over secondary evidence. However, it will be illustrated how numerous amendments to the procedural regimes of the ad hoc tribunals and the SCSL denote a clear tendency towards allowing for more evidence-in-chief of witnesses in writing. The rationale for these amendments is the wish to expedite the pace of trials. As a consequence, the principle of orality has increasingly become under pressure.

This chapter outlines the procedural norms applicable to the questioning of witnesses during investigation. It will be established that neither the statutory documents nor the practice of most tribunals and courts under review offer a detailed set of procedural norms on the

Likewise, Article 21 (3) STL evidences such preference: ‘A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form’.


questioning of witnesses as an investigative measure. Even still, no legal provision explicitly allows the Defence to interview witnesses. This right derives from other rights including the right of the defendant to obtain the attendance and examination of witnesses under the same conditions as witnesses against him or her and the general right of the accused to have adequate time and facilities for the preparation of his or her defence. Lacking relevant case law, it is often difficult to discover the Prosecution and Defence’s standard procedure for the conduct of pre-trial witness interviews.

After the definition of the terms ‘witnesses’ and ‘witness statements’, this chapter will shortly address the extent to which out-of-court witness statements may be admitted into evidence at trial in international criminal procedure. While the admission of evidence, strictly speaking, falls outside the scope of the present study, the procedural rules and practice of the international(ised) criminal courts and tribunals on the admissibility of prior witness statements may provide us with some hints on what procedural norms are to be upheld during the questioning of witnesses and on what the preferable standard is for recording pre-trial witness statements. Evidently, both the Prosecutor and the Defence have an interest in collecting evidence in a manner rendering it admissible at trial.

Secondly, this chapter will look into the interplay between the international Prosecutors and states in collecting testimonial evidence. It will identify the applicable procedural regime for the interrogation of witnesses conducted by national law enforcement officials, the Prosecution or by a combination thereof. Thirdly, the procedural norms and practices of the different tribunals and courts on the interrogation of witnesses will be scrutinised. Attention will be paid to the safeguards which apply to the questioning of witnesses. In particular, it will be asked whether a privilege against self-incrimination should be accorded by investigators to witnesses in international criminal proceedings. Fourthly, the procedural norms and practices identified will be critically assessed in light of international human rights law. Fifthly, some challenges in the gathering of witness testimony in the course of international criminal investigations will be addressed. Finally some tentative conclusions on the questioning of witnesses during the investigation phase of international criminal proceedings will be drawn.
II. DEFINING WITNESSES AND WITNESS STATEMENTS

§ Witnesses

In the previous chapter, it was highlighted how the precise status of a person in the course of an investigation may not always be clear and how such status may evolve. A person who is questioned as a witness may later become a suspect. The importance of a proper delineation and understanding of the different and sometimes changing status of a person during the investigation was underlined.

No definition of the term ‘witness’ is included in the Statute or the RPE of the ad hoc tribunals, the ICC or any of the internationalised criminal courts and tribunals under review. Nevertheless, some provisions may hint at the meaning of ‘witness’ in international criminal procedural law. Rule 90 (B) ICTY and Rule 90 (C) ICTR and SCSL RPE refer to someone who reports the facts of which he or she has knowledge. In turn, Rule 66 (2) ICC RPE refers to a person who is able to describe matters of which he or she has knowledge. While the term ‘matters’ is used in the second provision and ‘facts’ in the first, it has been argued that such difference is not decisive. Definitions which can be found in some other ICC documents are too specific and of limited use for our study. Among others, the ICC ‘E-Court Protocol’ defines a witness as a ‘person who has provided statements on which the Prosecution or the Defence intends to rely at the hearing’. This definition focuses on the trial phase itself and is therefore too narrow for our purposes. An alternative definition can be found in some of the case-specific protocols which have been adopted by ICC (Pre-)Trial Chambers and which deal with the issue of contacts with witnesses of the opposing party. There, ‘witness’ has been defined as ‘a person whom a party intends to call to testify during the trial proceedings,

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12 See supra, Chapter IV, II.1.
13 Ibid.
14 See also Rule 150 (B) STL RPE.
16 ICC, Consolidated E-Court Protocol, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-1263, T. Ch. I, 4 April 2008. The E-Court Protocol is a ‘technical protocol for the provision of evidence, material witness and victims information in electronic form for their presentation during the Trial’.
17 These protocols apply to persons ‘whom the party is aware of or has reasonable grounds to believe has provided a statement to or otherwise met with members of the opposing party as party of that party’s investigations […] and that the party has reasonable grounds to believe that the other party may call […] as a witness.’
provided that such intention has been conveyed to the non-calling party, either by the calling party including the individual on its witness list, or by the witness informing the non-calling party that he or she has agreed to be called as another party's witness, or by any other means that establish a clear intention on behalf of the calling party to call the individual as a witness and that this individual has consented thereto’. Likewise, this definition is trial-focused and too narrow for our study.

Notably, a distinction is drawn in the RPE of some tribunals between ‘expert witnesses’ and other witnesses. Other distinctions may also be drawn. The category of vulnerable witnesses refers to those witnesses that may suffer from the confrontation with the accused and/or with the memory of the crime. This may result in secondary traumatisation (re-traumatisation or increased traumatisation). It will be explained how certain procedural regulations may be beneficial towards these witnesses by either allowing a limitation of the number of times they have to testify or by providing specific modalities for the conduct of the questioning of such witnesses. Threatened witnesses are witnesses who have good reason to fear violent reprisals (from the accused or others) because of their testimony. This category includes insider witnesses, witnesses that have worked closely with, or in the same organisation of an accused and who may give valuable information on the conduct of the accused. The reliance on

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19 See Rules 94bis and 90 (C) ICTY RPE and Rules 94bis and 90 (D) ICTR and SCSL RPE; Rule 140 (3), 91 (3) and (4) and Rule 191 ICC RPE; Rule 150 (C) STL RPE. A distinction can be drawn between the broad categories of ‘expert witnesses’ testifying in their field of expertise and ‘fact witnesses’ (eyewitnesses or hearsay witnesses), see D. TOLBERT and F. SWINNEN, The Protection of, and Assistance to, Witnesses at the ICTY, in H. ABTAHI and G. BOAS (eds.), The Dynamics of International Criminal Justice, Martinus Nijhoff Publishers, Leiden, 2006, pp. 196-199.

insider witnesses may be critical in the context of prosecuting international crimes, involving senior political and military leaders.\textsuperscript{21}

\section*{Witness Statements}

A definition of ‘witness statements’ is equally lacking in the statutory documents of the \textit{ad hoc} tribunals, the Special Court or the ICC. Nevertheless, on several occasions in the context of determining the boundaries of the disclosure obligations incumbent on the Prosecutor, Trial Chambers had to establish the precise scope of witness statements. A functional definition was provided by the Trial Chamber in \textit{Milutinović}. A statement is a more or less verbatim account of what the witness has said to the Prosecution, which has been reviewed and signed by the witness. Such statements should be distinguished from interview notes, which are less than verbatim accounts of what the witness has said to the Prosecution, and which are not necessarily reviewed and signed by the witness.\textsuperscript{22} SCSL Trial Chamber II held in \textit{Brima et al.} that a ‘witness statement’ should be understood as “any statement or declaration made by a witness in relation to an event he or she witnesses and recorded in any form by an official in the course of an investigation.”\textsuperscript{23} In \textit{Blaškić}, the Appeals Chamber gave the following definition for witness statements in the context of Rule 66 on the Prosecutor’s disclosure obligations: “it is the account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation.”\textsuperscript{24} This latter definition includes a normative element by requiring a recording through due procedure. The first definition can be distinguished by its requirement of a signature from the witness and its limitation to the


\textsuperscript{22} ICTY, Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65ter List to add Michael Philips and Shaun Byrnes, \textit{Prosecutor v. Milutinović et al.}, Case No. IT-05-87-T, 15 January 2007, par. 12.

\textsuperscript{23} SCSL, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, \textit{Prosecutor v. Brima et al.}, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, par. 16; SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, \textit{Prosecutor v. Norman et al.}, Case No. SCSL 04-14-PT, T. Ch. I, 16 July 2004, par. 10. In \textit{Sesay}, the Trial Chamber agreed with the definition offered by the Prosecution and held that a witness statement can be “anything that comes from the mouth of the witness, regardless of the format.” “By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity.” The Chamber added that the fact that a witness statement is not in the ‘first person’ but in the ‘third person’ goes more to the form than to the substance and does not deprive the materials in question of the core quality of a statement. See SCSL, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, \textit{Prosecutor v. Sesay et al.}, Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005, par. 25-26.

\textsuperscript{24} ICTY, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-A, A. Ch., 26 September 2000, par. 15.
Prosecutor’s investigation. In the context of a discussion on investigative measures, a broader definition is preferred. For the purposes of this chapter, a witness statement will be defined as ‘any statement or declaration taken from a witness in relation to an event he or she has witnessed, taken out of court, in the course of an investigation, by either party, and recorded in any form’. The agreed upon definition also includes interview notes, taken by the investigator during the interview, in whatever form.

III. WITNESS STATEMENTS AS A SOURCE OF EVIDENCE: ADMISSIBILITY OF OUT-OF-COURT WITNESS-STATEMENTS

As shortly touched upon in the introduction to this chapter, out-of-court witness statements, resulting from the questioning of prospective witnesses, have increasingly been admitted into evidence in the proceedings before the ad hoc tribunals and the SCSL. Their introduction may be problematic as different problems regarding their reliability are associated with out-of-court witness statements: the statements have often been made years before, are often not taken under oath, are not subjected to cross-examination, are taken through interpretation and are sometimes unsigned. Recall that the ad hoc tribunals have not adopted a system resembling inquisitorial judicial systems whereby the witness statements are gathered by a non-partisan judicial officer, who should seek both exculpatory and inculpatory evidence and put these statements in a dossier for use at trial. Witness statements are prepared by a party...


26 Such notes constitute statements within the meaning of Rule 66 (a) (ii); see ICTY, Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65ter List to Add Michael Philips and Shaun Byrnes, Prosecutor v. Miladinović et al., Case No. IT-05-87-T, T. Ch. III, 15 January 2007, par. 15.

27 ICTY, Decision on Appeal Regarding Statement of Deceased Witness, Prosecutor v. Kordić and Čerkez, A. Ch., 21 July 2000, par. 27. The Appeals Chamber argued that such statements differ from the courtroom setting, with professional, double checked translation. In casu, the Appeals Chamber found that there were no formal circumstances that might increase its reliability, such as the hearing before an investigating Judge. In Sesay, the Trial Chamber emphasized that witnesses are often interviewed in rural, war-torn areas and witnesses are often illiterate: see SCSL, Decision on the Joint Defence Motion Requesting Conformity of Procedural Practice for Taking Witness Statements, Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, T. Ch. I, 26 October 2005, par. 10.

28 See supra, Chapter 3, III, on the principle of objectivity in international criminal procedure.
for the purpose of legal proceedings in which they are tendered and not by an independent officer. They could be considered less reliable than depositions.

In the case that the witness is present before the Chamber, the practice of the ad hoc tribunals is not to admit prior statements of a witness when that witness has given oral evidence, with the exception that the party who did not call the witness is allowed, during cross-examination, to refer to the witness’ prior statements to attempt to impeach the witness’ credibility by challenging the consistency and reliability of his or her testimony. The party calling the witness can use a prior witness statement when turning a witness into a hostile witness, with leave from the Chamber. Their admission can also be allowed in the interest of justice. A prior inconsistent written statement can only be admitted into evidence if the witness is confronted with it and given the opportunity to explain or deny the alleged inconsistencies with full awareness of what he or she had previously said.

Through amendments to Rule 90, the introduction of former Rule 94ter on the admission of affidavits and Rule 92bis on the admission of written hearsay evidence, the ICTY Judges made it possible for out-of-court witness statements to be admitted into evidence, without the witness testifying at trial. The use of written evidence was prompted by the need to expedite trials. Additionally, overlaps between cases tried before the ICTY and the wish to avoid the
need for witnesses to reappear several times to present testimony led to these changes.\textsuperscript{37} At present, the ad hoc tribunals, the SCSL and the STL contain analogous provisions on the admission of out-of-court witness statements as written evidence in lieu of oral testimony.\textsuperscript{38} These witness statements are allowed when they go to proof of a matter other than the acts or conduct of the accused as charged in the indictment. The ICTY Appeals Chamber ruled in Galić that prior statements given by prospective witnesses to an OTP investigator during the investigation cannot be tendered through the general Rule 89 (C) to avoid the stringent requirements of Rule 92bis.\textsuperscript{39} The latter Rule is lex specialis to Rule 89 (C).\textsuperscript{40} Such stringent conditions are justified given that the admission of such prior statements infringes upon the right of the accused to confront witnesses and diminishes the chances for the accused to challenge an aspect of the case against him or her.

Some technical safeguards to ensure the authenticity and veracity of the statement are provided for under Rule 92bis and require the maker of the statement to attach a declaration

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\item[38]\textsuperscript{38} Rule 92bis (A) ICTY RPE, ICTR RPE (proof of facts other than by oral means); Article 92bis SCSL RPE (alternative proof of facts) and Rule 155 STL RPE. Note that these provisions are not identical. Various modifications have led to distinctions in the formulation of these provisions. As noted by NERENBERG and TIMMERMAN, “[w]hile the different courts have influenced each other, borrowing both rules and jurisprudence from each other to suit their own specific goals, each judicial body has seen this area of the law evolve independently and differently such that, although there are large areas of overlap, there is no single scheme of general application that covers the entire field.” See M. NERENBERG and W. TIMMERMAN, Documentary Evidence, in K.A.A. KHAN, C. BUSSMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 461.

\item[39]\textsuperscript{39} ICTY, Decision on Interlocutory appeal Concerning Rule 92bis (C), Prosecutor v. Galić, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 31.

\item[40]\textsuperscript{40} Ibid., par. 31; Note that the SCSL Appeals Chamber ruled that Rule 92bis is not lex specialis to Rule 89 (C) SCSL RPE. However, the scope of Rule 92bis SCSL RPE is broader than equivalent Rule 92bis ICTY RPE and applies to information in lieu of oral testimony ‘including written statements and transcripts’, and is thus not limited to written statements and transcripts. See SCSL, Decision on ‘Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents’, Prosecutor v. Taylor, Case No. SCSL-2003-01-AR73, A. Ch. 6 February 2009, par. 30.
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that the content of the statement is true and correct to the best of that person’s knowledge and belief. The declaration should be witnessed either by ‘a person authorized to witness such a declaration in accordance with the law and procedure of a state’ or by ‘a presiding officer appointed by the Registrar for that purpose’. A non-exhaustive list of factors in favour of and against the admission of such evidence is included in Rule 92bis (A) (i) and (ii) ICTY and ICTR RPE and Rule 155 (A) (i) and (ii) STL RPE. It is for the Trial Chamber to decide whether or not witnesses are required to appear for cross-examination. Rule 92bis (A) ICTY, ICTR and SCSL RPE also allow for the admission of parts of a prior witness statement. Hearsay evidence of a summary prepared by an OTP investigator of the contents of the written statements given to the OTP investigators by prospective witnesses is admissible when the evidence summarised is itself admissible.

Rule 92bis is only lex specialis to 89 (C) for written evidence and transcripts falling within its terms. Rule 92bis only applies in the case that a statement was “prepared for the purposes of legal proceedings.” In addition, a written statement given to OTP investigators for legal proceedings can be received in evidence notwithstanding its non-compliance with Rule 92bis, when no objection has been taken to it, or when it otherwise becomes admissible (when the

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41 Rule 92bis (B) ICTY RPE. 42 On the non-exhaustiveness of this list, consider e.g. ICTY, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), Prosecutor v. Galić, Case No. IT-98-29-AR73.2, T. Ch., 7 June 2002, par. 9; ICTY, Decision on Prosecution’s Motions for the Admission of Written Evidence pursuant to Rule 92bis of the Rules, Prosecutor v. Mucić, Case No. IT-95-11-T, T. Ch. 1, 16 January 2006, par. 5; ICTY, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92 bis, Prosecutor v. Perišić, Case No. IT-04-81-T, 20 October 2008, par. 13; ICTR, Decision on Nzabonimana’s Motion for the Admission of Written Witness Statements, Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, T. Ch. III, 10 May 2011, par. 21. 43 Rule 92bis (C) ICTY RPE and Rule 92bis (E) ICTR RPE. There is no equivalent provision to be found in Article 92bis SCSL RPE. 44 Rule 92bis (A) (‘in whole or in part’). Note that Rule 155 (A) STL RPE is not clear in that regard. See ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), Prosecutor v. Galić, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 46. It was underlined by Judge Hunt in his dissenting opinion to the 2003 Appeals Chamber Decision in Milošević that witness statements taken early on in the investigation contain much information which is irrelevant to the issues at trial. See: ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, Dissenting Opinion of Judge Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, par. 13. 45 Ibid., par. 21. 46 ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), Prosecutor v. Galić, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 31; ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, par. 12-13. 47 ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), Prosecutor v. Galić, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 31; ICTY, Decision on Admissibility of Prosecution Investigator’s Evidence, Prosecutor v. Milošević, Case No. IT-02-54-AR73.2, A. Ch., 30 September 2002, par. 18 (3).
statement is asserted to contain a prior inconsistent statement). Remarkably, the Appeals Chamber further expanded the possibilities to rely on written statements in Milošević when it held that the written evidence should also be intended to be in lieu of oral evidence: when the witness (i) is present, (ii) can orally attest to the accuracy of the statement and (iii) is available for cross-examination and questioning by the Judges, Rule 92bis will not apply. In such case, testimony cannot be considered to be exclusively written within the meaning of Rule 92bis. Rather, in such a situation, the written statement may be admitted through Rule 89 (F) ICTY RPE which allows for the admission of evidence in written form ‘where the interests of justice allow’.

Later, this practice was codified in Rule 92ter of the ICTY and SCSL RPE, which now allows for the possibility to admit the written evidence of a witness even going to the acts and conduct of the accused as charged in the indictment, where the witness is present for cross-examination and questioning by the Judges. Other procedural innovations have since been introduced and allow for the admission of written evidence of witnesses who subsequently died, can no longer be traced or are, because of bodily or mental conditions, unable to testify.

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48 Ibid., par. 18.
49 ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, par. 16-17. The Appeals Chamber argued that the determination that, despite the appearance of the witness, the evidence constitutes written evidence pursuant to Rule 92bis would be a too formalistic interpretation.
50 Judge Hunt severely criticised the interpretation given to the relationship between Rule 89 (F) and Rule 92bis ICTY RPE. See ICTY, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, Prosecutor v. Milošević, Case No. IT-02-54-AR73.4, A. Ch., 30 September 2003, Dissenting Opinion of Judge Hunt on Admissibility of Evidence-in-Chief in the Form of Written Statement (arguing that the decision was a result of pressure following from the ‘completion strategy’). Also critical are M. NERENBERG and W. TIMMERMAN, Documentary Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 470 (noting that on occasion, this route allows the witness to simply attest “that the statement accurately reflects his or her declaration and what he would say if examined”, thereby undercutting the possibilities of cross-examining the witness).
51 Rule 92ter ICTY (Rev. 39, 13 September 2006) and SCSL RPE (as amended on 24 November 2006). The witness should attest that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined (Rule 92ter (A) (iii) ICTY and Rule 92ter (iii) SCSL RPE). Note that Rule 92ter SCt RPE differs from Rule 92ter ICTY RPE in that written statements and transcripts can only be admitted ‘[w]ith the agreement of the parties’. Compare Rule 92ter with Rule 156 STL RPE.
52 Rule 92quater ICTY RPE (Rev. 39, 13 September 2006) and Rule 92quater SCSL RPE (as adopted on 14 May 2007); Rule 92bis (C) ICTR RPE (which unlike Rule 92quater ICTY and SCSL RPE, does not allow for the admission of written evidence going to the acts and the conduct of the accused as charged). Compare Rule 158 STL RPE.
and of witnesses subjected to interference. In addition, the STL RPE provide for the admission of anonymous witness statements.

In line with the *ad hoc* tribunals and the SCSL, when this is not prejudicial to or inconsistent with the rights of the accused, the ICC allows for the admission of prior recorded testimony under certain conditions (which are more stringent than the requirements for the use of prior recorded evidence at the *ad hoc* tribunals). Prior recorded witness statements or audio or video records are admissible at trial in the case that the witness is present for cross-examination. In the case that the witness is not present at trial, the statement can only be admitted into evidence if both the Prosecutor and the Defence were present during the interview and had the opportunity to examine the witness. In both scenarios, the Trial Chamber retains discretion to admit the prior recorded evidence. Evidence concerning the acts and conduct of the accused may be admitted. Consequently, it may be important for the Prosecution to indicate in a request for taking a witness statement that certain persons should be permitted to be present and be allowed to assist in the execution process. Interestingly, no other requirements seem to apply which raises the question whether the parties can choose whether to take the testimony at the pre-trial stage or at trial. The said rule may even be an incentive to take witness statements in the course of the investigation. As underlined by KRESS, it is unlikely that Judges will adopt such a view. They will probably state that the trial proceedings should be the focal point of the presentation and evaluation of evidence. At the ICC, witness statements may play an important role at the confirmation hearing, where the person should have failed to attend as a witness or, having attended, not have given evidence at all or in material respect (Rule 92quinquies (A) (i) ICTY RPE).

Rule 159 STL RPE. The explanatory memorandum refers to the importance of anonymous witness testimony for the type of criminality (terrorism) the tribunal is dealing with. See STL Rules of Procedure and Evidence (as of 25 November 2010): Explanatory Memorandum by the Tribunal’s President, par. 36.

Article 69 (2) ICC Statute *juncto* Rule 68 ICC RPE.

Rule 68 (a) ICC RPE; While the first paragraph of Rule 68 only refers to previously recorded audio or video testimony, prior written witness statements are included in ‘other documented evidence’. See ICC, Decision on the Prosecution’s Application for the Admission of Prior Recorded Statements of two Witnesses, *Prosecutor v. Lubanga Dyilo, Situation in the DRC*, Case No. ICC-01/04-01/06, T. Ch. I, 15 January 2009, par. 18.

Rule 68 (b) ICC RPE.

ICC, Decision on the Prosecutor’s Request to Allow the Introduction into Evidence of the Prior Recorded Testimony of P-166 and P-219, *Prosecutor v. Katanga and Mathieu Ngudjolo Chui, Situation in the DRC*, Case No. ICC-01/04-01/07-2362, T. Ch. II, 3 September 2010, par. 15.

*ibid.*, par. 19.

Article 99 (1) ICC Statute.

Prosecutor need not call witnesses who are expected to testify at trial but can rely on documentary or summary evidence.  

A distinct avenue for the admission of prior witness statements is Article 56 ICC Statute. It allows the Prosecutor to request the assistance of the Pre-Trial Chamber, if the investigation presents a unique opportunity to take testimony or a statement from a witness who may not be available subsequently for the purposes of trial. The Pre-Trial Chamber may ‘take such measures to enable the taking of such evidence as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence’. The Defence should be informed of any unique opportunity to take the statement of a witness.

However, witness statements taken pursuant to Article 56 are not automatically admissible at trial. It seems unlikely that such a witness statement would be admissible if both parties did not have a chance to examine the witness during the recording. This would violate the right of the accused under Article 67 (1) (e) to examine the witnesses against him or her. The possibility for the Pre-Trial Chamber to authorise counsel for the accused person to participate or to appoint a counsel ‘to attend and represent the interests of the defence’, is included in the non-exhaustive list of measures that can be taken in Article 56 (2) ICC Statute. As noted by GOSNELL, such appointment would not allow for competent cross-examination “unless an appointed counsel is told who the target of the investigation is; knows the essential nature of the charges and the material facts; and has adequate opportunity to consult with the target of the investigation in order to be properly instructed.” In case the witness testimony could be

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63 Article 61 (5) ICC Statute.
64 See the chapeau of Rule 68 ICC RPE (‘When the Pre-Trial Chamber has not taken measures under article 56’).
65 Article 56 (1) (b) ICC Statute; Rule 114 ICC RPE. Such measures may include: (a) recommendations or orders regarding procedures to be followed; (b) directing that a record be made of the proceedings; (c) appointing an expert to assist; (d) authorizing counsel for a witness to participate, or otherwise attend and represent the interests of the defence; (e) naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons; (f) taking such other action as may be necessary to collect or preserve evidence.
66 As provided for under Article 56 (1) (c) ICC Statute.
67 Article 56 (4) ICC Statute; The Trial Chamber will have to determine the admissibility and weight of such witness statement, in accordance with Article 69 ICC Statute.
69 Article 56 (2) (d) ICC Statute.
relevant for several potential future suspects, it may even be more difficult for any appointed
counsel to adequately defend the interests of the Defence. The interests of these suspects will
not necessarily coincide.\textsuperscript{71}

An example of a unique opportunity to record testimony or a statement from a witness is that
of a witness who suffers from a terminal illness. Whether this procedure also applies to
vulnerable witnesses when exposure to repetitive questioning may be harmful, is an issue
which was left undetermined at the Preparatory Commission.\textsuperscript{72} Consequently, the practice of
the Court will have to clarify this issue.

IV. APPLICABLE PROCEDURAL REGIME

As noted in relation to the questioning of suspects or accused persons, the procedural regime
that applies depends on the status of the person conducting the interview.\textsuperscript{73} In practice,
witness statements are usually taken by an OTP investigator, assisted by an interpreter.\textsuperscript{74} In
turn, defence investigators will interview potential defence witnesses. The scenario whereby
witness statements are taken by a prosecution or defence investigator seems preferable to the
scenario where they are taken by national law enforcement officials. It helps to ensure that the
statement is taken in a manner for it to be admissible as evidence in the proceedings before
the tribunal. However, other scenarios are possible. Alternatively, the interview may be
conducted by tribunal investigators with national law enforcement officials present. Lastly,
the international Prosecutor can request the national law enforcement officials to conduct the
questioning of the witness. In the latter scenario, pursuant to the still prevalent ‘\textit{locus regit
actum}’ rule, the requirements and rules of procedure and evidence under national law will

\textsuperscript{71} C. SAFERLING, The Rights and Interests of the Defence in the Pre-Trial Phase, in «Journal of International
\textsuperscript{72} H. FRIMAN, The rules of Procedure and Evidence in the Investigative Stage, in H. FISHER, C. KRESS and
S.R. LÜDER (eds.), International and National Prosecution of Crimes under International Law: Current
Rights and Interests of the Defence in the Pre-Trial Phase, in «Journal of International Criminal Justice», Vol. 9,
2011, p. 664 (“The examination of the witness turns out to be a rather hypothetical enterprise from the defence’
point of view. Without knowing the person of the suspect it will not be possible to formulate concrete questions
and test the reliability of the witness in a thorough way. Without knowing the ‘story’ of the suspect it is difficult
to envisage a counterpoint for assessing the testimony”); F. GUARRIGLIA and G. HOCHMAYR, Article 56, in
O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes,
\textsuperscript{73} See supra, Chapter 4, II.2.
\textsuperscript{74} ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 23.
normally be followed. These differences in the procedural regime which applies are less problematic than regarding the interrogation of suspects or accused persons because the rules on the conduct of witness interviews in international criminal procedure are scarce. Consequently, the need for uniformity between the procedure of the trial forum and the executing state is less felt here. No specific procedural guarantees for witnesses (which can be identified as ‘minimum rules’) are explicitly provided. Consequently, stronger procedural safeguards may be provided for under national procedural rules.

As far as the ICC is concerned, it follows from the Statute that if the Prosecution decides to question a witness, it may either request the responsible national authorities of the state where the witness is present to conduct the questioning (in accordance with the laws of the requested state), or it may conduct the questioning itself. In case the Prosecutor decides to request that the responsible national authorities conduct the questioning, the ICC Statute leaves broad discretion for the Prosecutor to participate in the questioning. Alternatively, where the Prosecutor conducts the questioning directly on the territory of the state, different scenarios may apply. Firstly, the State Party may voluntarily allow the ICC Prosecutor to conduct the questioning on its territory. Secondly, the Prosecutor may conduct the questioning directly on the territory of the State Party pursuant to Article 99 (4) ICC Statute. Overall, this possibility to directly execute the questioning on the territory of a State Party is lex specialis to the general regime for the execution of requests for assistance (under Part 9 of the ICC Statute).

75 In inter-state legal assistance in criminal matters, this principle entails that the requested state executes a request according to its own procedural norms. It is primarily (but not solely) grounded on the sovereignty of the requested state. A shift from the prevalent locus regit actum rule towards the forum regit actum principle can be noted in inter-state legal assistance. The execution of requests is increasingly determined by the procedural rules of the requesting State. This trend can clearly be noted in the cooperation in criminal matters between EU Member States. On the locus regit actum principle, consider e.g. B. DE SMET, Internationale samenwerking in strafzaken tussen Angelsaksische en continentaﬂe landen, Intersentia, Antwerpen – Groningen, 1999, p. 146–159; G. SLUITER, International Criminal Adjudication and the Collection of Evidence: Obligations of States, Antwerp, Intersentia, 2002, pp. 204 – 206.

76 Articles 93 (1) (c) and 99 (1) and (4) ICC Statute respectively.

77 Article 99 (1) ICC Statute stipulates that Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request.

78 Consider e.g. C. SAFERLING, International Criminal Procedure, Oxford, Oxford University Press, 2012, p. 264. In such scenario, Article 54 (3) (d) ICC Statute is at the Prosecutor’s disposal (‘The Prosecutor may: Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person’).

79 ICC, Decision on “Defence Application Pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the
gathering of evidence provided that (i) the witness voluntarily participates in the questioning and (ii) the taking of evidence directly by the Prosecutor is ‘necessary for the successful execution of the request’. Consequently, the possibilities to directly interview witnesses on the territory of the State Party, against the wishes of that state, are normally limited.\(^{81}\) If the Prosecutor directly interviews witnesses on the territory of a State Party, then the possibility also exists to conduct this interview in the absence of the authorities of the requested state.\(^{82}\) Such a possibility is important, as a witness may feel intimidated and be reluctant to be interviewed in the presence of the authorities. As the text of the Statute requires that the questioning in the absence of the authorities be ‘essential for the execution of the request’, the availability of this course will probably be limited to the scenario where the witness refuses to be questioned while national authorities are present.\(^{83}\) If the state requested, pursuant to Article 99 (4) ICC Statute, is also the state on whose territory the alleged crimes have been committed, and there has been a determination of admissibility pursuant to Articles 18 and 19 ICC Statute, then the Prosecutor may directly execute such an interview following all possible consultations with the requested state.\(^{84}\) In other cases, the Prosecutor may execute such requests following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party.

Thirdly, Article 57 (3) (d) ICC Statute allows the Prosecutor to conduct the questioning directly on the territory of a State Party in the scenario of a failed state, when authorised to do so by the Pre-Trial Chamber. Fourthly, it could be argued that the Prosecutor may request that the State Party conduct compulsory measures on the territory of the state concerned, pursuant to a request under 93 (1) (l) ICC Statute. The requested State Party can refuse such requests if prohibited by domestic law. This course of action would even allow for the direct questioning of witnesses by the Prosecutor on a non-voluntarily basis, unless this is prohibited under the laws of the requested state.


\(^{82}\) Article 99 (4) ICC Statute.


\(^{84}\) Article 99 (4) (a) and (b) ICC Statute.
Unlike the procedural frameworks of the *ad hoc* tribunals and the Special Court, the ICC Statute includes several procedural safeguards which apply to the questioning of witnesses. It should be asked whether these safeguards equally apply in cases where witnesses are questioned by national authorities or other actors. Article 55 (2), which applies to suspects, expressly states that the safeguards listed therein also apply to situations when questioning is conducted by national authorities pursuant to a request under Part 9. In turn, Article 55 (1) ICC, which provides several procedural safeguards for individuals interviewed, does not expressly refer to the questioning by national authorities pursuant to a request. However, Rule 111 (2) of the ICC RPE remedies this *lacuna* and states that *‘when the Prosecutor or national authorities question a person, due regard shall be given to Article 55’*.

Consequently, similar to the procedural safeguards applicable to the questioning of suspects and accused persons, it is argued here that these safeguards constitute *‘minimum rules’*, which should be applied to the questioning of a witness by *any authority*. Whenever a state executes a request for assistance in the questioning of witnesses, these minimum rules should be upheld, otherwise risking the exclusion of the resulting statement. However, recall that the procedural safeguards of Article 55 (1) ICC Statute apply *“[i]n respect of an investigation under this Statute”* and hence, only apply to investigative acts which are *“taken either by the Prosecutor or by national authorities at his or her behest.”* It follows that these procedural safeguards do not apply when a witness is questioned in the context of national proceedings which are unrelated to the proceedings before the Court.

Where Rule 111 (1) ICC RPE, which outlines the formal requirements regarding the taking of the statement, does not explicitly refer to questioning by national authorities, it would be good practice to also include these requirements in any request for the interview of a witness.

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85 Compare Article 55 (2) ICC Statute.
86 Compare, supra, Chapter 4, II.2.2.
88 In accordance with Article 99 (1) ICC Statute. For a discussion of these formal requirements, see *infra*, Chapter 5, V.2.4.
V. POWER AND APPLICABLE PROCEDURAL NORMS

V.1. The ad hoc tribunals and the SCSL

V.1.1. The power of the parties to interview witnesses

The statutory documents provide the Prosecutor with the power to question witnesses during an investigation.89 While the power is located in the investigation section of the Rules, this power clearly extends to both the pre-trial stage sensu stricto and to the trial phase.90 Unlike the interrogation of suspects and accused persons, no set of procedural norms regulate the questioning of witnesses in the course of an investigation. The right for the Defence to interview witnesses is not explicitly provided for but derives from the principle of ‘equality of arms’, the right to obtain the attendance and examination of witnesses on the accused’s behalf under the same conditions as witnesses against him or her as well as from the right of the accused to have adequate time and facilities for the preparation of his or her defence.91

V.1.2. The power to compel witnesses to be interviewed

An important question is whether, and to what extent, a witness can be compelled to be interviewed by the parties during the investigation. When assessing the safeguards surrounding the conduct of witness interviews, e.g. the existence of a privilege against self-incrimination for witnesses, the possibility to compel witnesses to be interviewed or not is a primary concern.92 It should be reiterated that the prospect of compelling a witness to be interviewed by national law enforcement personnel following a request to that extent depends on the national law. Besides, what is at issue here is not the possibility for the Chamber to require the attendance of witnesses before the Chamber, but the prospect of the Prosecutor or Defense to interview unwilling witnesses in the course of their respective investigations.

89 Article 18 (2) ICTY Statute, Article 17 (2) ICTR and Article 15 (2) SCSL Statute; Rule 39 (i) ICTY, ICTR and SCSL RPE.
90 ICTY, Decision on Prosecution’s Motion to Interview Defence Witnesses, Prosecutor v. Mrkić et al., Case No. IT-95-13/1-T, T. Ch. II, 1 October 2006, par. 3.
91 Article 19 (1) and Article 20 (4) (b) and (e) ICTR Statute, Articles 20 (1) and 21 (4) (b) and (e) ICTY Statute and 17 (4) (b) and (e) SCSL Statute. ICTY, Judgment, Prosecutor v. Tadić, A. Ch., 15 July 1999, par. 43 - 52.
92 Indeed, the existence of such privilege will arguably be more important in case witnesses can be compelled, by the Prosecutor or by the Defence, to be interviewed.
The answer to the question formulated above, depends on the answer to another question. It should first be determined whether or not individuals are under the obligation to cooperate with the tribunal. If so, then witnesses may be required to participate in an interview in the course of the investigation. The question whether the tribunal may subpoena witnesses was at stake in the *Blaškić* case.93 The Appeals Chamber held that it follows from provisions such as Article 18 (2) (conferring upon the Prosecutor certain powers, including the power to question suspects, victims and witnesses) as well as from the spirit and purpose of the Statute, that the tribunal “has an incidental or ancillary jurisdiction over individuals other than those whom the International Tribunal may prosecute and try.”94 This concerns individuals that may be of assistance in the task of dispensing criminal justice entrusted to the tribunal.95 Consequently, witnesses can be subpoenaed by the tribunal.

However, the Appeals Chamber also stated that no binding orders can be directed to state officials with the exception of state officials acting in their private capacity.96 This only concerns the production of documents in their custody in their official capacity. The Appeals Chamber in *Krstić* distinguished this scenario from evidence of what the official saw or heard in the course of exercising his official functions.97 The functional immunity enjoyed by state officials does not prevent them from being compelled to give evidence in the latter case.

Normally, in order to enter into contact with witnesses, the Prosecutor should rely on the cooperation of the competent judicial or prosecutorial authorities of the country concerned, unless (i) the legislation of the state authorises the tribunal to enter into direct contact with a private individual or (ii) the state or entity prevents the Court from fulfilling its functions.98 Furthermore, with regard to states or entities of the Former Yugoslavia, there is no need to go

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95 *Ibid.*, par. 48; the Chamber continues that “Article 29 also imposes upon states an obligation to take action required by the International Tribunal vis-à-vis individuals subject to their jurisdiction.”
97 ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 27; Judge Shahabuddeen dissented and held the view that the Tribunal does not have the competence to subpoena a state official to testify on what he or she has seen or heard. Interestingly, Judge Shahabuddeen in this regard referred to the wording of Rule 54bis ICTY RPE, which was adopted on 17 November 1997 and which he ‘reasonably assumed’, was based on *Blaškić* and which the judges who adopted the Rule understood as implying that information acquired by a state official in his or her official capacity could only be obtained from the state and not from the state official, neither trough a binding order nor through a subpoena.
through official channels to identify, summon and interview witnesses. According to the Appeals Chamber, “[i]n particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth, and might also imperil not just his own life or personal integrity but possibly those of his relatives. It follows that it would be contrary to the very purpose and function of the International Tribunal to have State officials present on such occasions.”

The question whether a similar obligation exists for individuals to cooperate with the SCSL does not seem to have been given much attention in its jurisprudence. Nevertheless, since Rule 54 SCSL RPE closely resembles Rule 54 of the ICTY and ICTR, it seems logical that witnesses on the territory of Sierra Leone can be subpoenaed.

Once it is established that the Chambers of the ad hoc tribunals as well as the SCSL hold the power to issue binding orders to private individuals, who are consequently under an obligation to cooperate, it must be asked whether and how a witness can be compelled to be interviewed by the Prosecutor or Defence in the course of the investigation. Neither the Prosecutor nor the Defence holds the power to compel an unwilling party to submit to a pre-trial interview. Rather, if they want to compel an unwilling person, they must seek the assistance of the Chamber. Under Rule 54, the Chamber holds the power to subpoena the witness. In Krstić, the Appeals Chamber stated that Rule 54 includes the possibility to issue a subpoena to require a prospective witness to attend at a nominated place and time in order to

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99 Ibid., par. 53. According to the Appeals Chamber, this category includes states on the territory of which crimes may have been perpetrated and some authorities which might be implicated in the commission of these crimes.
100 Ibid., par. 53.
101 Consider in this regard: SCSL, Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance if Subpoena Ad testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, Prosecutor v. Norman et al., Case No 04-14-T, T. Ch. I, 13 June 2006, par. 6. In contrast, it would be difficult to subpoena witnesses residing in other states, where these states are not a party to the SCSL Agreement. For a similar view, see G. SLUITER, Legal Assistance to Internationalized Criminal Courts, in C. P. R. ROMANO, A. NOLLKAEMPER and J. KLEFFNER (eds.), Internationalized Criminal Courts: Sierra Leone, East-Timor, Kosovo and Cambodia, Oxford, Oxford University Press, 2004, p. 401, fn. 66. Consider also Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 8 (holding that such subpoena “would be enforceable through the Sierra Leone police and judiciary” and would not be enforceable in other countries).
be interviewed by the Defence if such attendance is necessary (necessity requirement) for the preparation or conduct of trial (purpose requirement). Such a request can only be honoured by the Chamber after showing “a reasonable basis for the belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues.” The assessment hereof will be based mainly on the position held by the prospective witness in relation to the events: any relationship he or she has or had with the accused which is relevant to the charges, the opportunity he or she may reasonably be thought to have had to observe or learn about the events and any statement made by him or the Prosecution or others in relation to those events. According to the Appeals Chamber, the test should be applied in a liberal way but any fishing expedition should be prevented. The party must show that it was unable to obtain voluntary cooperation from the witness (a reasonable attempt is required) and it should at least be reasonably likely that an order would produce the degree of cooperation needed to interview the witness. Furthermore, the evidence should not be obtainable by other means. The Appeals Chamber in Krstić emphasised that the Chamber should not

104 ICTY, Decision on Application for Subpoenas, Prosecutor v. Krstić, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 10, 17; ICTY, Decision in the Issuance of Subpoenas, Prosecutor v. Halilović, Case No. IT-01-48-AR73, A. Ch, 21 June 2004, par. 5; ICTR, Decision on Nzirorera’s Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, T. Ch. III, 12 July 2006, par. 9. Judge Shahabuddeen disagreed with the majority on this particular point. He took issue with the fact that the Chamber would have the power under Rule 54 to subpoena a witness to an out-of-court defence interview, in which the Prosecution has no right to participate, which is not held under oath, and is not part of the proceedings of the Court itself. While he agreed that the Chamber has the power to facilitate the attendance of a potential witness at a defence interview (by removing any obstacles), he did not agree that the Chamber has power to compel such attendance. He argued that Rule 54 should be interpreted in accordance with the principles known to nations in the international community. According to Judge Shahabuddeen, these principles do not allow for such subpoena (as domestic or international jurisprudence is lacking). See ICTY, Decision on Application for Subpoenas, Prosecutor v. Krstić, Case No. IT-98-33-A, A. Ch., 1 July 2003, Dissenting Opinion of Judge Shahabuddeen and ICTY, Decision in the Issuance of Subpoenas, Prosecutor v. Halilović, Case No. IT-01-48-AR73, A. Ch, 21 June 2004, Declaration of Judge Shahabuddeen. The 'purpose-requirement' (for the preparation or conduct of trial) may imply that the possibility to compel witnesses to attend pre-trial witness interviews is limited to the post-indictment stage. For a similar view, consider A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 252.

105 ICTY, Decision on Application for Subpoenas, Prosecutor v. Krstić, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 10 (emphasis added).
106 Ibid., par. 11.
107 Ibid., par. 11.
108 ICTR, Decision on Nzirorera’s Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, T. Ch. III, 12 July 2006, par. 9.
109 Ibid., par. 17.

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issue subpoenas lightly. Especially in the early years, the ICTY was reluctant to issue subpoenas compelling witnesses to testify. The ICTR formulated the conditions for it to issue a subpoena to a prospective witness slightly differently: (i) reasonable attempts to obtain voluntary cooperation by the witness are required, (ii) the testimony of the witness should be able to materially assist the case and (iii) the witness’ testimony must be necessary and appropriate for the conduct and fairness of the trial. In the absence of a police force, the ad hoc tribunals need to rely on the cooperation by the national states to enforce all subpoenas.

In the *Krstić* case, the Appeals Chamber took into consideration the argument put forward by the Defence that “in a situation where the Defence is unaware of the precise nature of evidence which a prospective witness can give and where the Defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the Defence to […] force the witness to give evidence ‘cold’ in court without knowing first what he will say.” “That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty.” Leading such evidence would be imprudent.

In practice, Defence counsels are rather reluctant to rely on Rule 54 to compel a witness to testify at trial. Forcing a witness to come and speak may not be a good strategy. The

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111 For example, the tribunals have declined to honour requests in case there is no prospect for the necessary cooperation, see e.g. ICTR, Decision on Defence Motion for Subpoena to Witness G, *Prosecutor v. Nzirorera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 20 October 2003, par. 22.


115 Consider in that regard: Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p.4 (“In our adversarial system, if you want to subpoena someone, if you want someone to testify and to give information that serves your case, you are not going to subpoena someone to come, and you do not even know what they are going to say.”).

116 Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, pp. 4, 6 (“When you subpoena a witness, you are literally forcing someone to come and say this or the other. A witness
mechanism of compelling witnesses to attend a pre-trial interview may take away some of this reluctance. Nevertheless, the willingness of Trial Chambers to subpoena witnesses differs.¹¹⁷ Some ICTR Defence counsel criticise the broad discretion that is given to the Judges to either honour or reject a request to subpoena a particular witness.¹¹⁸ In the exercising of this discretion lies an inherent risk of prejudging by determining that the testimony of a specific witness will not be helpful and that for this reason the witness need not be subpoenaed.¹¹⁹ One counsel notes that the completion strategy and the need to speed up trials may have led to a decreased willingness of the Judges to honour such requests.¹²⁰ Another defence counsel held that whether or not to issue a subpoena on behalf of the Defence is a political decision.¹²¹ For example, all SCSL Defence counsels interviewed alleged that political reasons may have led SCSL Trial Chamber I to decline to subpoena the former president of Sierra Leone in the Norman et al. (CDF) case while honouring such request in the Sesay et al. (RUF) case.¹²²

who is not willing to speak, and you force them to come and speak, it is a little tricky, particularly when they are apprehensive”).¹¹⁷

¹¹⁷ Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 5 (“It is very difficult to get that kind of enforcement”).

¹¹⁸ Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 4 (“The problem, of course, is that a subpoena should be virtually automatic. If you act responsibly you should be able to get your subpoena automatically, and the law is that you have to – there is discretion to refuse a subpoena, which is broader than my simple subpoenaing of a witness in a national jurisdiction”). Compare e.g. SCSL, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, Prosecutor v. Norman et al., SCSL-2004-14-T, A. Ch., 11 September 2006, par. 8 (“The determination whether a subpoena should be issued is in the discretion of the Trial Chamber. This is emphasised in Rule 54 by the word “may”; a Trial Chamber may issue a subpoena as may be necessary. There is nothing in this rule that makes it mandatory on the Trial Chamber to issue a subpoena”).


¹²⁰ Interview with Mr. Taku, Defence Counsel, ICTR-21, Arusha, 23 May 2008, p. 13.

¹²¹ Interview with Mr. Black, Defence Counsel, ICTR-19, Arusha, 22 May 2008, p. 8.

¹²² Interview with a Defence Counsel at the SCSL, SCSL-01, Freetown, 22 October 2009, p. 7 (“I think, and I hope I am wrong, there was some suspicion that perhaps there was some manipulation of the Judges. Not by the Judges, of the Judges, in turning down the application”); Interview with a Defence counsel at the SCSL, SCSL-02, Freetown, 22 October 2009, p. 5 (“Justice Itoe was very mentally against that. For him, political considerations overruled legal considerations”); Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 6 (“In the Norman [CDF] case they declined to subpoena Kabbah and in [the RUF case] they did not. I would say they probably had more reason to order a subpoena in the Norman case but of course that would not have made good theatre, to have him answering the same allegations as Norman, whereas in our case it did make good theatre because there was not going to be any harm done to the prosecution case apart from a few pieces of mitigation evidence”); Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 18 (“You have to realize that at the time, Moses Blah was testifying in the Taylor trial in The Hague a few days before. A lot of people say there are reasons other than necessarily legal ones why it might have been allowed. […] Interestingly, the Judges banned any of the lawyers from asking him anything about the CDF, obviously because a lot of people wanted to know about the CDF and the chain of command. But we were not allowed to ask anything about the CDF”). Consider in this regard, for the CDF case: SCSL, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena Ad testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, Prosecutor v. Norman et al., Case No 04-14-T, T. Ch. I, 13 June 2006; SCSL, Dissenting Opinion of Hon. Justice Bankole Thompson on Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of Subpoena Ad testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, Prosecutor v.
Even if a Trial Chamber issues a subpoena, there is the problem of enforcing that subpoena in case of non-compliance.123 Still, requesting a subpoena, even if unsuccessful, serves a useful purpose where it creates a record that the evidence was effectively not available at trial as this is a prerequisite for its potential future admission as new evidence on appeal.124

V.1.3. Procedural safeguards

Unlike the situation where a suspect or accused person is interrogated, no procedural set of norms apply to the questioning of witnesses.125 One author rightly noted that “[t]he procedure concerning summons and questioning of […] witnesses […] appears to have taken place largely in a non-judicial context […]”126 In the absence of such norms, many questions arise on the actual practice of the Prosecutor and Defence investigators. Indirectly, the jurisprudence of the ad hoc tribunals and the SCSL on the admission of prior recorded witness statements and on the disclosure obligations of the Prosecutor provides some indications with regard to the ‘preferable practice’ for the interviewing of witnesses. In addition, the ‘ICTY Manual on Developed Practices’ includes some ‘best practices’.127

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123 Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, pp. 6-7 (referring to the problems to enforce the subpoena on the former Rwandan Minister of Defence Gatsinzi in the Military I case).


126 ICTY, Decision on the Admission into Evidence of Slobodan Praljak’s Evidence in the case of Naletilić and Martinović, Prosecutor v. Prlić et al., Case No. IT-04-74-T, T. Ch. III, 5 September 2007, par. 15 (noting that the procedural guarantees provided for suspects and accused persons under the Statute and the RPE do not apply to witnesses).


128 See the references in the footnotes.
A number of important procedural safeguards, which apply to the interrogation of suspects and accused persons, do not apply to the questioning of witnesses. First, and unlike the ICC Statute, the Statutes of the ad hoc tribunals and the SCSL do not recognise a privilege against self-incrimination with respect to every person during the investigation. Such protection (although not absolute) is only offered to witnesses testifying in courtroom. It allows witnesses to object to any statement which may incriminate him or her. The statutory documents only provide suspects and accused persons with a right to remain silent during the investigation. Secondly, no right to have the assistance of counsel at the investigation stage is provided for in the Statute, RPE or the directive on the assignment of defence counsel. This is also the case if a potential witness the Defence wants to interview is a person convicted by the tribunal. A potential defence witness is only entitled to such assistance in case he qualifies as a suspect or an accused person in an ongoing case. In contrast, when a detained person is temporarily transferred to the detention unit to provide witness testimony at trial, he or she holds the right to legal assistance.

Statements which are not given voluntarily, but rather obtained by oppressive conduct cannot be admitted pursuant to Rule 95. When there are prima facie indicia of oppressive conduct, the burden is on the party seeking to have the statement admitted into evidence, to prove that the statement was given voluntarily and was not obtained by oppressive conduct. The ICTY Manual on Developed Practices notes that care should be taken by investigators in making promises of witness protection insofar that they may be portrayed by the Defence as an

128 See infra, Chapter 5, V, 2.3.1.
129 Rule 90 (E) ICTY, ICTR and SCSL RPE. Given that this provision is to be found under Part VI on ‘proceedings before Trial Chambers’, its application to the pre-trial phase is precluded. At least one commentator holds the view that the ‘right not to incriminate oneself or confess guilt’ applies also to witnesses. ALAMUDDIN argues that “[t]he jurisprudence of the ad hoc tribunals also confirms that the privilege against self-incrimination applies to interviews conducted by the ICTY or ICTR Prosecutor before a person becomes an accused, and it has specifically been applied in the context of suspect interviews.” It is correct that a ‘right to remain silent’ applies to suspect interviews. Such right does not only follow from the jurisprudence, but is laid down in Rule 42 (A) (iii) ICTY, ICTR and SCSL RPE. However, as far as witness interviews are concerned, it is the opinion of this author that the existence of such guarantee is not certain. See A. ALAMUDDIN, Collection of Evidence, in K.A.A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 262.
130 The Chamber retains the power to compel the witness to answer the question. In such case, the evidence received cannot be used in any subsequent prosecution for any offence other than false testimony (ICTY) or perjury (ICTR) or false testimony under solemn declaration (SCSL).
131 See supra, Chapter 4, IV.2.1.
132 ICTY, Decision on Motion for Assignment of Counsel to Dragomir Milošević, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, T. Ch. III, 6 January 2012, par. 9-11.
133 Rule 90bis ICTY Statute juncto Article 5 (iii) of the Directive on the Assignment of Defence Counsel.
134 ICTY, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, Prosecutor v. Martić, Case No. IT-95-11-T, T. Ch. I, 19 January 2006, par. 9; see supra, Chapter IV, 4.2.1.
inducement to provide favourable evidence. Whether the jurisprudence of the *ad hoc* tribunals and the Special Court concerning the voluntariness of statements resulting from interviews of suspects or accused persons applies *mutatis mutandis* to statements resulting from witness interviews has not yet been determined by the case law.

V.1.4. Statement taking modalities

It was argued previously that recording statements may be a helpful tool to enhance transparency and ensure the integrity of the questioning process. In this section, the existence or nonexistence of such an obligation with regard to witness interviews will be discussed first. Next, it will be asked whether other procedural norms exist which regulate the conduct of the questioning.

According to the RPE, the Prosecutor *may* record witness statements. Consequently, there seemingly is no obligation incumbent on the Prosecutor to do so. However, such reading may be at tension with the disclosure obligations of the Prosecutor. The Prosecutor has the obligation to make the statements of all witnesses he or she intends to call available to the Defence. Taking witness statements seems to be a precondition for the meaningful compliance with this disclosure obligation. Moreover, it may be argued that a meaningful defence investigation and cross-examination at trial presupposes the disclosure of such statements. However, in a contempt case, a Trial Chamber at the ICTY has held that no such obligation of statement taking currently exists. According to the Chamber, there is only a duty of the Prosecutor to disclose witness statements insofar that such statements have been taken. The Chamber held that no obligation of the Prosecutor to take witness statements from the witnesses he intends to call at trial can be derived from Rule 39. Interestingly, the Chamber subsequently stated that ‘considering the limited scope of the contempt case at

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137 See supra, Chapter 4, IV.6.1.
138 Rule 39 (i) ICTY, ICTR and SCSL RPE.
139 Rule 66 (A) (ii) ICTY, ICTR and SCSL RPE.
140 ICTY, Decision on Urgent Defence Motion Requesting an Urgent Motion to the Amicus Curiae to Take and Disclose Witness Statements, *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5, T. Ch., 29 January 2009. It is important to note that in this contempt case, *amicus curiae* was appointed pursuant to Rule 77 (D) (ii) of the ICTY RPE to prosecute the case.
141 Ibid., par. 6.
hand’, fair trial guarantees are respected and the exercising of the defendant’s right to cross-
examine the witness is guaranteed by the obligation under Rule 65ter (E) ICTY RPE to
disclose an adequate summary of the facts on which the witness is expected to testify. 142 A
contrario, one could understand this statement as implying that in other, more complex cases,
the Rule 65ter (E) summaries may not suffice to guarantee the right to a fair trial and the
defendant’s right to cross-examine witnesses. Consequently, the taking of witness statements
may be necessary in order to uphold the right to a fair trial and the right of the Defence to
cross-examine witnesses. Considering the large and complex nature of the crimes falling
within the jurisdiction of the ad hoc tribunals and the SCSL arguably, the right to adequate
time and facilities for the preparation of a defence requires taking witness statements. 143
In addition, the Appeals Chamber’s Judgement in Niyitegeka may be interpreted as deriving
from the disclosure requirements under Rule 66 (A) (ii), an obligation to record witness
statements. 144 Nevertheless, in the Hadžić case, ICTY Trial Chamber II recently clearly
rejected the argument that there exists an obligation to take statements from prospective
witnesses who are to testify viva voce. 145

Even in the absence of a clear-cut obligation to take witness statements, it has been the
Prosecutor’s constant and consistent practice for investigators or prosecutors to take
statements of all witnesses interviewed. 146 Lacking a clear-cut obligation, this consistent
practice is important on its own merits and creates certain expectations regarding the level of
diligence that is required from the Prosecution in conducting its investigations.

The Statutes and RPE of the ad hoc tribunals and the SCSL are equally silent on the existence
of any obligation incumbent on the Defence to take witness statements. A straightforward
obligation to take statements from all witnesses interviewed does not exist.

142 Ibid., par. 8.
143 Article 20 (4) (b) ICTR Statute, Article 21 (4) (b) ICTY Statute and 17 (4) (b) SCSL Statute.
144 ICTY, Judgement, Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 30 (“Pursuant
to Rule 66(A)(ii) of the Rules, the Prosecutor has a duty, inter alia, to make available to the Defence copies of
the statements of all witnesses whom the Prosecutor intends to call to testify at trial” (emphasis added)).
145 ICTY, Decision on Urgent Defence Motion to Preclude GH-162’s Appearance until after Disclosure of a
proper Witness Statement, Prosecutor v. Hadžić, Case No. IT-04-75-T, T. Ch. II, 17 May 2013 (“The Trial
Chamber observes that there is no requirement for a party to take a statement from a witness who is to testify
viva voce”). Confirming, consider C. GOSNELL, Admissibility of Evidence, in K.A.A. KHAN, C. BUISMAN
and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University
146 ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 23 et seq.; ICTY, Decision on
Urgent Defence Motion Requesting an Urgent Motion to the Amicus Curiae to Take and Disclose Witness
Statements, Prosecutor v. Florence Hartmann, Case No. IT-02-54-B77-5, T. Ch., 29 January 2009, par. 2.
Lacking a set of procedural norms on the conduct of questioning witnesses, the practice of the ad hoc tribunals and the SCSL provide us with some guidelines for the conduct and modalities of witness interviews. In Niyitegeka, the Appeals Chamber outlined the ‘ideal standard’ for taking witness statements. It held that ideally, the statement should be composed of all the questions that were put to the witness and of all the answers given by the witness. The time of the beginning and the end of the interview, specific events such as requests for breaks, the offering and accepting of cigarettes, coffee and other relevant events which could have an impact on the statement or its assessment should be recorded as well.

The recording must be in a language the witness understands. The witness should have a chance to read the record or to have it read out to him or her as soon as possible in order to make any corrections he or she deems necessary. The statement should be signed by the witness to attest the truthfulness and correctness of its content to the best of the witness’s knowledge and belief. From this signature follows the presumption that the statement was recorded pursuant to the Rules. Also the investigator and interpreter should sign the statement. It has been considered that a signature is an important parameter to assess the authenticity of the statement, which is central to the credibility and reliability of documentary evidence. These detailed guidelines mirror at least some of the procedural norms that apply to the interrogation of suspects and accused persons.

Nevertheless, the Appeals Chamber subsequently emphasised that a witness statement that was not recorded in accordance with this standard does not necessarily render the proceedings

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148 Ibid., par. 31. Whether the statement is redacted in the ‘first person’ or ‘third person’ goes more to the form than to the substance; SCSL, Decision on Disclosure of Witness Statements and Cross-Examination, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, T. Ch., 16 July 2004, par. 22.
150 Ibid., par. 32.
153 Ibid., par. 32.
154 See supra, Chapter 4, IV.6.1.
unfair, and can be admitted into evidence. However, the inconsistency with the standard can be taken into consideration when assessing the probative value of the statement.\textsuperscript{155}

Consequently, it remains up to the Prosecution to determine its witness-taking procedures.\textsuperscript{156} While OTP guidelines for questioning witnesses presumably exist they are not publicly available.\textsuperscript{157} Meanwhile, the ICTY Manual on Developed Practices provides us with some insights. The ICTY considers it good practice to ask the witness for identification, before the interview.\textsuperscript{158} Importantly, the statement should avoid paraphrasing and be recorded in the witness’ own words. Preferably, investigators instead of prosecutors should take statements in order to allow them to testify on the circumstances of the statement taking. Care is to be taken about the questioning of traumatised witnesses and the risk of social or cultural stigma of victims of sexual assault. The statement should be recorded and signed in a language the witness understands. If not possible, the statement should be read to the witness by the interpreter and the details of the review and signing process should be recorded.\textsuperscript{159}

It is unfortunate that this ‘best practice’ as well as the \textit{Niyitegeka} ‘ideal standard’ for recording witness statements, outlined above, are often disregarded in practice. Many pre-trial witness statements are in fact mere summaries of the information conveyed during the interview rather than full transcripts.\textsuperscript{160} In addition, some of the safeguards which are intended to ensure that the transcript accurately reflects what the witness has said, are not always

\textsuperscript{155}ICTY, Judgement, \textit{Prosecutor v. Niyitegeka}, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, par. 36.

\textsuperscript{156} At least on one occasion, the Defence in \textit{Zigiranyirazo} has tried to call OTP staff as Defence witnesses to inquire into the witness-taking procedures of the defence to understand the discrepancies between witness’s oral testimonies and written submissions. However, given the formulation of the Defence motion, the Chamber dismissed it and considered it ‘frivolous’ and ‘possibly vexatious’. (According to the Trial Chamber, the Defence did not contain the slightest suggestion of showing of misfeasance or an error in the witness statement-taking process). See ICTR, Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses, \textit{Prosecutor v. Zigiranyirazo}, Case No. ICTR, 2001-73-T, T. Ch., 6 July 2006.

\textsuperscript{157} Within the ICTR OTP, an investigator handbook detailing the standard operating procedure for the taking of statements was reportedly created in 2001, but is not publicly available, see P. VAN TUYL, Effective, Efficient and Fair: An inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone, War Crimes Studies Center, University of California Berkeley, September 2008, p. 36, citing an interview with former SCSL Prosecutor Stephen Rapp.

\textsuperscript{158} ICTY Manual on Developed Practices, Turin, UNICRI Publisher, 2009, p. 23.

\textsuperscript{159} This practice was prevalent at the ICTR, where witnesses were requested to sign their statements after an oral translation into Kinyarwanda of their statement which was written in English or French. See C. GOSNELL, Admissibility of Evidence, in K.-A. KHAN, C. BUISMAN and C. GOSNELL (eds.), Principles of Evidence in International Criminal Justice, Oxford, Oxford University Press, 2010, p. 391.

\textsuperscript{160} N.A. COMBS, Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions, Cambridge, Cambridge University Press, 2010, p. 279 (arguing, more generally, that investigative practices should be improved in order to reduce omissions and inconsistencies). Consider \textit{ibid.}, p. 280 (“the vast majority of ICTR statements merely a summary of the information the witness has provided”)

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upheld in practice. For example, one Prosecution investigator in the Sesay et al. (RUF) case testified that it was not the standard practice to read back statements to the witness.\textsuperscript{161} More alarming, it has been held that in the early days of the ICTR, the performance review was based on the number of statements taken by the investigator. It is clear that such policy does not offer many incentives to investigators to uphold the standards for recording statements outlined above.\textsuperscript{162}

Audio or video-recordings of witness interviews are not systematically made.\textsuperscript{163} At the ICTR, only the interviews with important insider witnesses were audiotaped.\textsuperscript{164} Such recordings can help to ensure the integrity of the proceedings.\textsuperscript{165} However, it has been noted that certain disadvantages are usually connected to the taping of witness interviews. Witnesses may be reluctant to speak while being recorded\textsuperscript{166} and transcribing recordings may create backlogs.\textsuperscript{167}

In principle, the parties are free to choose which witnesses they will interview. While the Trial Chamber may compel the attendance of a witness at a pre-trial interview, witnesses are not compellable to provide testimony at the investigation stage. No procedural norms allow the sanctioning of the witness in case of non-cooperation during an interview. Only by having a witness directly testifying at trial, can a witness, withstanding some exceptions, be compelled to answer questions put before him or her.\textsuperscript{168} However, two exceptions to this principle are to be noted. First, in the exceptional scenario of a deposition-taking, the witness may be compelled to answer questions prior to the commencement of the trial.\textsuperscript{169} This follows from

\begin{quotation}
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\textsuperscript{161} SCSL, Transcript, Prosecutor v. Sesay et al., Case No. 2004-15-T, T. Ch. 1, 28 April 2005, p. 16 (“Q. Do you recall reading the statement back to the witness in order that he could verify its contents? A. No, I did not. It was not the practice how we took statements.”).


\textsuperscript{163} ICTR, Decision on Defence Motion for Order to Prosecution to Comply with his Disclosure Obligations and Motion for Stay of Proceedings Due to the On-going Violations of the Prosecutor’s Disclosure Obligations, Prosecutor v. Nshogoze, Case No. ICTR—07-91-T, T. Ch. III, 10 February 2009, par. 11.


\textsuperscript{165} J. JACKSON and Y. M’BOGE, The effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”, in «Leiden Journal of International Law», Vol. 26, 2013, p. 960 (it allows to check what was said, what the interpreter has said and to detect any interpretation errors).


\textsuperscript{167} Ibid., p. 24.

\textsuperscript{168} The ICTY, ICTR and SCSL RPE include the power to hold a witness in contempt if he or she contumaciously refuses or fails to answer a question (Rule 77 (A) (i)).

\textsuperscript{169} The scenario set forth in Rule 71 of the ICTY, ICTR and SCSL RPE. Rule 71 does not preclude depositions being taken prior to the commencement of the trial, see ICTY, Decision on Prosecution’s Motion to take
\end{quotation}
Rule 71 (E) ICTY, ICTR and SCSL RPE, which stipulates that the deposition is to be taken in accordance with the Rules. This implies that the provisions on the hearing of witnesses in court will apply mutatis mutandis.\textsuperscript{170} Secondly, if a witness is interviewed by national judicial enforcement officers pursuant to a request for legal assistance, national procedural law may provide that witnesses can be compelled to testify.

The scenario where a witness refuses to answer a question is rare. First, a witness who does not want to testify will normally not voluntarily appear for a pre-trial interview. It is to be recalled that a Chamber will only subpoena a witness to attend a pre-trial interview in the case where it is “reasonably likely that there would be cooperation if such an order were made.”\textsuperscript{171} Most implementing laws allow the questioning of witnesses by the Prosecutor through an on-site investigation only if these witness interviews are voluntary in nature.\textsuperscript{172} Of course, if the witness is interrogated by national law enforcement officials pursuant to a request, the national procedure will apply and may require the witness to answer questions put to him or her.

It should be noted that, while both parties are in principle free to call the witnesses they want at trial, testimonial privileges may prevent compelling testimony from certain classes of witnesses. While jurisprudence on requests to subpoena privileged witnesses to pre-trial interviews is lacking, such requests would most likely not be honoured by a Chamber. Arguably, the same approach would be taken as the tribunal takes to requests to subpoena these persons to give evidence at trial. In case the Prosecutor requests the national law enforcement officials to interview a witness, national procedural norms recognising privileges may prevent evidence taking.


\textsuperscript{171} ICTY, Decision on Application for Subpoenas, Prosecutor v. Krštić, Case No. IT-98-33-A, A. Ch., 1 July 2003, par. 12.

\textsuperscript{172} See e.g. the German ‘Law on Cooperation with the International Tribunal in respect of the Former Yugoslavia (Law on the International Yugoslavia Tribunal)’ of 10 April 1995, par. 4 (4); Norway: Section 3 of the ‘Act No. 38 of 24 June 1994 relating to the incorporation into Norwegian law of the United Nations Security Council Resolution on the establishment of international tribunals for crimes committed in the former Yugoslavia and Rwanda’; Article 22 of the Swiss ‘Federal order on cooperation with the International Tribunals for the Prosecution of Serious violations of International Humanitarian Law’, 21 December 1995; Section 5 of the Finnish ‘Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal’ of 5 January 1994.
Pre-trial witness interviews are normally not conducted under oath. This is in contrast to the examination of witnesses at trial, where the witness is in principle required to make a solemn declaration. However, if a witness is interviewed by national judicial enforcement officers pursuant to a request for legal assistance, national procedural law may require the taking of an oath. In addition, when a deposition is taken in the course of the investigation, the witness will be required to testify under oath during the investigation. The witness should make a solemn declaration to tell the truth, prior to the interview.

If a witness knowingly and willingly makes a false statement in a witness statement (SCSL) or in statement taken in accordance with Rule 92bis (ICTY and ICTR) or quater (ICTY), he or she may be held criminally liable. The witness should know or have reason to know that the statement may be used in proceedings before the court or tribunal. The ICTR Appeals Chamber held that for Rule 91 (H) ICTR RPE to apply, the formal requirements of Rule 92 bis should be respected. Since Rule 91 (H) ICTR RPE is a criminal provision, it should be strictly construed. However, where Rule 91 (H) or (D) does not apply, a witness providing false testimony may still be held in contempt pursuant to Rule 77 ICTY, ICTR and SCSL RPE.

V.2. The International Criminal Court

V.2.1. The power of the parties to interview witnesses

The prosecutorial power to question witnesses follows from Article 54 (3) (b) of the ICC Statute. During the preliminary examination stage, the Prosecutor may also receive written or oral testimony at the seat of the Court. In turn, the Defence's

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173 Rule 90 (A) ICTY, ICTR and SCSL RPE. Rule 90 (B) includes an exception for children, who in the opinion of the Chamber, do not understand the nature of a solemn declaration.
174 Rule 71 (E) ICTY, ICTR and SCSL RPE.
175 Rule 91 (H) ICTY and ICTR RPE and Rule 91 (D) SCSL RPE respectively.
176 ICTR, Decision on Callixte Nzabonimana’s Appeal against the Trial Chamber’s Decision on Motion for Rule 91 Proceedings against Prosecution Investigators, Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-AR91, A. Ch., 27 April 2012, par. 13 (in casu, the Appeals Chamber held that there was no indication that the statement was witnessed by a person authorized to do so pursuant to Rule 92 bis (B) ICTR RPE. Hence, the witness statements were not subject to Rule 91 ICTR RPE).
177 Ibid., par. 15.
178 Ibid., par. 15.
179 Article 15 (2) ICC Statute and Rule 104 (2) ICC RPE. See supra, Chapter 3, I.2.
180 See supra, Chapter 5, IV.
power to interview witnesses follows from its rights to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, to raise defences and to present other evidence admissible under this Statute and to adequate time and facilities for the preparation of the defence.  

Article 93 (1) (a) and (b) of the ICC Statute contain the obligation of States Parties to provide assistance in the collection of evidence, including in the identification and localisation of persons as well as the taking of testimony under oath.  

States can also be requested to assist in the questioning of any person being investigated or prosecuted. Exceptionally, in case of a 'unique opportunity', the Pre-Trial Chamber can be involved in the questioning of witnesses.

V.2.2. The power to compel witnesses to be interviewed

Unlike the ad hoc tribunals and the SCSL, it is unlikely that the Prosecutor can apply for a subpoena to compel a witness to cooperate with the ICC and to attend a pre-trial witness interview. In the performance of its powers prior to trial or in the course of the trial, Article 67 (1) (b) and (e) ICC Statute.

Potential witnesses should voluntarily agree to be interviewed.  

181 Article 67 (1) (b) and (e) ICC Statute.
182 ICC, Decision on Variation of Summons Conditions, Prosecutor v. Francis Kirimi Muthaura, Uguru Muigai Kenyatta and Mohammed Hussein Ali, Situation in the Republic of Kenya, Case No. ICC-01/09-02/11-38PTC II, 4 April 2011, par. 15 (“the defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly and any party is prohibited from trying to influence his or her decision as to whether or not to agree to be contacted by the Defence”). However, consider also ICC, Decision on the Defence Request for a Temporary Stay of Proceedings, Prosecutor v. Abdullah Banda Abukar Nourain and Saleh Mohammed Jerbo Jamus, Situation in Darfur, Sudan, Case No. ICC-02/05-03/09-410, T. Ch. IV, 26 October 2012, par. 128 (“The Chamber is mindful that it is ultimately the witnesses' prerogatives to choose whether or not to agree to an interview with the defence. However, given the difficulties experienced by the defence to conduct on-site investigations, the prosecution should spare no efforts to secure defence access to these individuals. The prosecution submitted that it cannot compel the witnesses, but "just put the scenario to them and let them decide". The Chamber encourages the prosecution to consider doing more than just that. The Chamber notes that measures have been taken and that some progress has been made, but it nevertheless encourages the prosecution to continue its efforts to secure defence contacts or interviews with these witnesses”).
183 Article 93 (1) (a) and (b) ICC Statute. Compare with Article 93 (1) (e), which deals with the voluntary appearance of persons as witnesses or experts before the Court. When such request is made, an instruction should be annexed on Rule 74 ICC RPE on self-incrimination (see Rule 190 ICC RPE).
184 Article 56 ICC Statute. See supra, Chapter 5, IV.
185 See supra, Chapter 5, V.1.2. Consider e.g. J.N. MAOGOTO, A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime, in «University of Queensland Law Journal», Vol. 102, 2004, p. 114 (“conspicuously absent is any subpoena power. Neither the Judges nor the Prosecutor of the ICC appear to have any power to compel witnesses to appear”)
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ICC Statute provides the Trial Chamber with the power to require, “the attendance and testimony of witnesses and the production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute.” It has been argued that Article 64 (6) (b) could form the basis for an international obligation for witnesses to appear and testify before the Court. However, neither an obligation for witnesses to cooperate directly with the ICC, nor a power for the Court to compel witnesses to attend a pre-trial witness interview can be derived from this provision. First, Article 64 (6) (b) ICC Statute only applies to the trial stage, and not to pre-trial witness interviews. In addition, the provision refers to ‘requiring the attendance’, which should be distinguished from ‘ordering’ or ‘subpoena’. Further, it should be noted that the relationship between the Court and States Parties (including individuals) is regulated in Part 9 of the Statute and that Article 64 (‘Functions and Powers of the Trial Chamber’) rather delineates powers between the different organs of the Court.

Overall, the different model of the ICC, less based on verticality, prevents the Court from directly issuing binding orders to individuals. This approach resembles inter-state cooperation rather than of the vertical approach and the Blaškic precedent at the ad hoc tribunals. It has also been noted that the necessary procedural provisions for the enforcement of individuals to appear at trial or at a pre-trial interview (through state cooperation or through direct action (contempt proceedings)) are equally absent.

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193 Ibid., pp. 596-599.
Other commentators disagree and argue that Judges hold the power to compel the attendance of witnesses pursuant to Article 64 (6) (b) ICC Statute. The Court could find that a person’s attendance and testimony are necessary and on that basis request the assistance of the relevant State to secure his or her appearance, e.g. by making a request for such assistance under the catch-all provision of Article 93 (1) (l) ICC Statute (any other type of assistance not prohibited by the law of the requested State). If the domestic legislation of the State concerned allows the Court to make such a request, or at a minimum does not prohibit it, the Court could seek the assistance of a State in this way. However, such a reading seems at odds with the express limitation of Article 93 (1) (e) ICC Statute of the cooperation obligation of States Parties to facilitate ‘the voluntary appearance of persons as witnesses or experts before the Court’.

Nevertheless, this impossibility for the Prosecutor to compel a witness to attend a pre-trial witness interview may be circumvented. States Parties can always voluntarily go beyond the cooperation obligations provided for under Part 9, if this is allowed by their municipal laws. The Court may make a request to a state under Article 93 (1) (b) for the taking of witness testimony by its law enforcement officials, on the Court’s behalf. If the Court cannot require the state to compel the person’s appearance for questioning at the national level, then

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194 See e.g. C. KRESS, The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise, in «Journal of International Criminal Justice», Vol. 1, 2003, p. 616 (noting that there is a conflict between the internal law of the Court (Article 64 (6) (b) ICC Statute) and its external law (Part 9, including Article 93 (1) (e) and (7) (a) (i) ICC Statute) which should be resolved by giving priority to the internal law “because the cooperation regime was not meant to undermine the basic principles of internal procedural law”); C. KRESS and K. PROST, Article 99, in O. TRIFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, München, Verlag C.H. Beck, 2008, pp. 1576 – 1577 (“The better view therefore is that the Trial Chamber may well, pursuant to article 64 para. 6 (b) create an international obligation of persons to appear and testify before the Court, but that States are under no duty to enforce that obligation”). Compare S.N. NGANE, Witnesses before the International Criminal Court, in «The International Law and Practice of International Courts and Tribunals», Vol. 8, 2009, pp. 433 – 434 (holding that the Trial Chamber may require witnesses to attend and testify at trial, but more hesitant as to whether the Chamber may summon or subpoena witnesses).

195 R. RASTAN, Testing Co-operation: The International Criminal Court and National Authorities, in «Leiden Journal of International Laws», Vol. 21, 2008, p. 436 (The author additionally suggests that the wording of Article 64 (6) (b) ICC Statute (“by obtaining, if necessary, the assistance of Statutes as provided in this Statute” (emphasis added)), may indicate that the court may directly address individuals, in so far as domestic legislations “recognize the ability of the ICC to issue orders or subpoenas directly to individuals on its territory, thereby bypassing the need to channel a request through its national authorities. In such a case the assistance of the state concerned would not be ‘necessary’”).


197 Consider e.g. S.N. NGANE, Witnesses before the International Criminal Court, in «The International Law and Practice of International Courts and Tribunals», Vol. 8, 2009, p. 441.
the domestic legislation of the state in question will typically enable the police or the judiciary to exercise such powers when required. In addition, the request may indicate that Prosecution investigators should be permitted to be present and be allowed to assist in the questioning of the witness (Article 99 (1) ICC Statute). That being said, it is evident that the absence of such subpoena powers poses important challenges to the investigations. Even greater problems arise in case that parties seek to interview witnesses which reside in states not party.  

When Chambers of the Court indeed lack the power to subpoena witnesses to appear and give testimony at trial, the ability of parties to rely on interviews conducted during the investigative stage takes on added importance. In order for the recorded witness testimony to be admissible when the subsequent presence of a witness at trial cannot be guaranteed, it may be paramount to secure examination of the witness by both parties during the investigative stage.  

V.2.3. Procedural safeguards

In Article 55 (1), the ICC statute outlines different procedural safeguards for witnesses. The importance of outlining such rights should be highlighted. It reflects a move away from the traditional focus in national criminal justice systems on the duties of witnesses in the criminal process. Article 55 (1) reflects an understanding of witnesses as ‘participants’ in the criminal process rather than mere sources of evidence. The increased significance of testimonial evidence gathered outside the courtroom because of the absence of powers to compel witnesses to testify at trial necessitates the presence of sufficient procedural guarantees. These guarantees are necessary to avoid major discrepancies between the procedural regime that applies when witnesses testify in the courtroom and the situation where testimonial evidence is gathered outside the court. It is important to reiterate that from the moment a person

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199 Rule 68 (a) ICC RPE.
qualifies as a suspect, he or she also enjoys the rights under Article 55 (2) ICC Statute, including the right to the assistance of counsel.201

V.2.3.1. Privilege against self-incrimination

The ICC Statute has been hailed for extending the human rights protection to all persons during a criminal investigation, since it provides a privilege against self-incrimination for witnesses.202 Such privilege offers protection to the witness, at the moment of the intake of the evidence.203 It should be distinguished from the right to remain silent which is available to suspects and accused persons. Where Article 55 (1) (a) ICC Statute speaks of a right not to be compelled to incriminate oneself, it must be established that some form of compulsion occurred. Consequently, persons can incriminate themselves during the investigation or can confess guilt, but may not be compelled to do so.204 An explicit obligation to inform the witness about the existence of such a right, before the start of the questioning, is lacking in 55 (1) (a) ICC Statute. However, it is the routine practice of the Prosecution that witnesses are informed of such right and this obligation has been included in the Regulations of the OTP. 205 Some clarification is necessary regarding the precise scope of this privilege and its application to national authorities.

201 ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 149 (“If someone became a suspect, his or her rights were protected by securing the assistance of counsel, in accordance with Article 55(2) of the Statute”).


203 It was noted in the 1996 report of the Preparatory Committee that the right of witnesses to enjoy some degree of protection from giving self-incriminating evidence was supported (par. 276), see Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of proposals), 2006, p. 109.


205 Consider Regulation 40 (c) of the OTP Regulations. Consider also ICC, Prosecution’s Observations Regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-336, PTC I, 20 March 2008, par. 21 (“Although neither the statute nor Rules so require, the Prosecution has adopted, and consistently applied, a policy of informing all persons questioned – including under Article 55(2) – that their evidence may be used in subsequent proceedings. During Witness 12’s interview, the Prosecution ensured that the witness had voluntarily consented to give evidence in relation to the investigation and that his taped evidence might be used as evidence in court proceedings before the ICC”).
When Article 55 (1) (a) ICC Statute is read together with other provisions in the ICC RPE, it can be asked whether the privilege it provides is as unqualified as it seems at first. In particular, Rule 74 ICC RPE may be understood as qualifying this privilege. It provides that the Chamber may require a witness testifying before the Court to answer a question that may lead to self-incrimination. This presupposes that an assurance has been given to the witness by the Chamber that the evidence will be kept confidential, will not be disclosed to the public or any state and that it will not be used, either directly or indirectly, against that person in any subsequent prosecution by the Court. The authority of the Court to provide such assurances derives from Article 93 (2) ICC Statute. If this rule were to be applicable to the investigation phase, then the witness who has agreed to be interviewed can be similarly required to answer certain questions, provided that an assurance of confidentiality and non-use of the evidence against him or her in any proceedings before the Court has been offered.

However, it follows from the wording of Rule 74 that the provision of such an assurance can only be given by ‘the Chamber’. Additionally, Article 93 (2) ICC Statute refers to a ‘witness or an expert appearing before the Court’. It thus appears that Rule 74 can only be applied by extension during investigations when Pre-Trial Chambers are involved in the taking of evidence, such as in case of a unique investigatory opportunity under Article 56, as part of judicial proceedings. Additionally, the position of a witness being interviewed during the investigation differs considerably with that of a witness testifying in court. In the former situation, there is no possibility for the questioning investigator or Prosecutor to direct

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207 According to Article 93 (2) ICC Statute, ‘[t]he Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State’.

208 Consider ICC, Version publique expurgée de « Ordonnance relative à la mise en œuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement de procédure et de preuve au profit de témoins de la Défense de Germain Katanga », Procureur v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. ICC-01/04-01/07-2748, TC II, 3 May 2011, par. 24 (“La Chambre tient à rappeler que c'est à elle, et non pas au Procureur, d'octroyer les garanties prévues par la règle 74 du Règlement”). Rule 74 ICC RPE mentions the Prosecutor and Defence only with regard to respectively the obligation and possibility to inform the Chamber and Prosecutor on the self-incriminating potential of prospective witness testimony (Rule 74 (8) and 74 (9) ICC RPE).

the witness to answer a question with an accompanying sanctioning mechanism. Only the Court can sanction a witness for misconduct in refusing to comply with an order to answer a specific question. In turn, the Prosecutor could enter into an agreement with a witness limiting the use of their statement to solely generating new investigative leads. This would not serve as a guarantee of immunity from prosecution, but could nonetheless serve as one method to facilitate investigations by encouraging lower-level insiders to provide information which could assist in the investigation of persons situated at higher levels of responsibility.

Finally, it is difficult to conceive how the assurances that are available under Rule 74 ICC RPE could apply to a request that has been made for national authorities to take a witness statement under Article 93 (1) (b) of the ICC Statute. KRESS argues that national authorities are bound to respect Article 55 (1) (a) “in the form of the ‘translation into an immunity from use’ which this provision has received by virtue of Rule 74.” However, the national authorities are in no position to offer immunity from use and as such to effectively prevent further prosecution by the ICC. From the above, it can be concluded that from Article 55 (1) (a) derives an unqualified right for witnesses not to be compelled to incriminate themselves during the investigation.

This view is supported by the jurisprudence of the Court. In the Situation in the Republic of Kenya, Pre-Trial Chamber II decided that neither Article 93 (2) ICC Statute, nor Rule 74 ICC RPE apply to the situation where a person is requested by the Prosecution to testify in the Republic of Kenya. Also Article 57 (3) (c) does not encompass the authority for the Pre-Trial Chamber to provide immunity from prosecution to any person. Rather, the Pre-Trial

210 Compare Rule 65 and Rule 171 ICC RPE. According to Regulation 40 of the OTP Regulations, the witness should be informed, before the commencement of the interview, of the voluntary nature of it and the possibility to conclude the interview at any time. It may be a further indication that the OTP Regulations do not include any limitation to the right against self-incrimination of witnesses.

211 Article 71 (1) ICC Statute, juncto Rule 65 ICC RPE; Rule 171 ICC PRE. Rule 65 includes the power to compel witnesses appearing before the Court.

212 Articles 54 (3) (d) and (e) and 67 (2) ICC Statute.


214 As pointed out by KRESS, this offering of an immunity of use may also conflict with the principle of legality at the national level. ibid., p. 330, fn. 68.


216 ibid., par. 14 (“A literal and contextual interpretation of this provision makes clear that the Chamber has the authority to order measures designed to protect the individual, who is put at risk on account of the activities of the Court, from physical harms, such as threats and intimidation. This interpretation finds further support in the
Chamber held that if the persons are questioned as witnesses, they enjoy the right not to be compelled to incriminate themselves.217

V.2.3.2. Other procedural safeguards

§ The right to have the assistance of a competent interpreter and such translations as necessary to meet the requirements of fairness

This requirement was analysed in the discussion on the legal framework for questioning suspects and accused persons. Previously it was discussed how the requirements of Article 55 (1) (c) ICC Statute exceed human rights norms by specifically requiring interpreters be ‘competent’ and by requiring that the questioning be translated if it occurs in a language the person does not fully understand and speak.218 It was shown that the right for witnesses interviewed to have ‘such translations as are necessary to meet the requirements of justice’ is in line with human rights jurisprudence.219 While common sense dictates that an interpreter be at the disposal of every witness who is unable to understand or speak the interview language, the formulation thereof as a right is a strengthening welcome to the procedural rights of witnesses.

§ The prohibition of any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment

In a similar vein, the right of any person to be free from such forms of behaviour by investigators was discussed above.220 In the previous section on the interrogation of suspects and accused, it was argued that the prohibition of duress, coercion or threats encompasses forms of ‘oppressive conduct’.221 Unfortunately, these forms of behaviour are not further

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217 Ibid., par. 16 (“The Chamber believes that any potential risk of prosecution on the basis of a possibly self-incriminating statement by the Applicants is a scenario for which the Court's basic texts, in particular article 55 of the Statute, offer the appropriate remedy”).
218 See supra, Chapter 4, IV.4.2.
219 See supra, Chapter 4, IV.4.2.
220 See supra, Chapter 4, IV.2.2 and IV.5.2.
221 See supra, Chapter 4, IV.2.1.
defined and the Prosecutor has not made public his understanding thereof. It will be for the ICC to determine what forms of behaviour are prohibited.

It was argued that Article 55 (1) provides minimum rights which should be upheld when states interrogate witnesses following a request to that extent. This may seem to prevent the use of compulsory processes by national states to obtain statements from witnesses. Article 55 (1) (b) provides that a person shall not be subjected to any form of coercion. Yet, Article 93 (1) (b) of the ICC Statute has been interpreted and implemented by national states to allow for the use of coercive powers in conducting interviews. Clearly, as opposed to the use of compulsion during the course of such questioning, Article 55 (1) (b) should not be interpreted to prevent, in and of itself, national authorities from using compulsory processes to require the attendance of a person for questioning.

V.2.4. Statement taking modalities

Different from the ad hoc tribunals and the SCSL, Rule 111 (1) ICC RPE provides a duty to record the formal statements made by a witness questioned in relation to an investigation or proceeding. Only ‘formal statements’ are to be recorded, not statements resulting from pre-interview assessments.

In the taking of witness statements, the Prosecution in practice follows a two-step approach. Investigators in the field are responsible for the identification and initial screening of potential witnesses. It was previously discussed in Chapters 2 and 3 how the task of identifying and establishing contacts with witnesses is often outsourced to intermediaries. The first step of the statement-taking process consists of an initial meeting with the OTP investigator, which includes a basic interview. This ‘screening interview’ is

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224 Problems surrounding the use and supervision of intermediaries by the ICC Prosecution were already discussed at length. See supra, Chapter 2, VII.1 and Chapter 3, III.

225 ICC, Transcript of Deposition on 16 November 2010, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010, p. 64 (testimony of P-0582); ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 11. See also supra, Chapter 4, II.1.2.
preparatory in nature. Intermediaries are normally not present. Its purpose is to determine the potential usefulness of the witness. In addition, the investigator tries to assess the reliability of the witness, his or her security situation and to find out whether the person may have committed a crime under the ICC Statute. The screened information by investigators is then provided to OTP analysts and a broader OTP team which determines whether a statement should be taken, which can later lead to a testimony before the Court. They also assesses the status of the person concerned. Following this screening process, if it is decided that the individual should testify, a longer interview is held. Investigators inform the witness of the voluntariness of the questioning.

The ICC RPE require the signature of the person conducting and recording the questioning as well as the signature from the witness. The date, time and place of the interview, together with all persons present during the interrogation should also be mentioned in the record. Then the interview is read back to the witness. If someone refuses to sign the record, this should be noted as well as the reasons thereof. From the wording of Rule 111 (2) ICC RPE, it can be derived that these procedural obligations only apply to the Prosecutor, but not to witness interviews conducted by the Defence. Rule 112 (4) of the ICC RPE may be

226 ICC, Judgement pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 148; ICC, Transcript of Deposition on 16 November 2010, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06- Rule68Deposition-Red2-ENG, pp. 64-65 (testimony of P-0582); ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 12.  
227 ICC, Redacted Decision on the “Defence Application Seeking a Permanent Stay of Proceedings”, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC01/04-01/06-2011, T. Ch. I, 7 March 2011, par. 125 - 126 (“At no stage during the investigation were intermediaries involved in taking statements of potential witnesses, making decisions as to which witnesses to retain or withdraw or which lines of investigations/inquiry to pursue […]. Instead, it is submitted that the evidence reveals that they served two main purposes: to identify and then contact potential witnesses, and to collect and provide security information regarding the region, particularly to the extent that this material was relevant to potential witnesses”).  
228 Transcript of Deposition on 16 November 2010, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, p. 5 (testimony of P-0582); ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 11.  
229 Ibid., p. 11.  
231 ICC, Judgment pursuant to Article 74 of the Statute, Prosecutor v. Lubanga Dyilo, Situation in the DRC, Case No. ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, par. 150.  
233 Also the signatures of his or her counsel and of the Prosecutor or Judge, if present, are required.  
234 Rule 111 (1) ICC RPE.  
235 ICC, Transcript, Prosecutor v. Katanga and Ngudjolo Chui, Situation in the DRC, Case No. 01/04-01/07-T-81, T. Ch. II, 25 November 2009, p. 15.
interpreted as an encouragement to the Prosecutor to make an audio or video recording of the interview (especially for interviews with vulnerable witnesses) even though no strict obligation exists. In addition, according to Rule 112 (5), if a unique opportunity to take testimony or a statement from a witness occurs, then the Pre-Trial Chamber may decide to apply the procedure for the audio or video recording of suspects’ and accused persons’ interviews to witness interviews.236

Upon authorisation by the Pre-Trial Chamber, the information which has to be recorded pursuant to Rule 111 (1) may not be disclosed to the Defence. In allowing such non-disclosure, the Pre-Trial Chamber should take into consideration the rights of the suspect.237

Because of the stringent conditions for the admission of witness statements at trial, it is recommended that if an Article 93 (1) (b) request is made, that request should provide for the direct participation of both parties in the questioning.238 It should also request that the recording procedure of Rule 111 (and Rule 112) be followed.

236 Rule 112 (5) ICC Statute only refers to Article 56 (2) ICC Statute (measures to ensure the efficiency and integrity of the proceedings and to protect the rights of the defence, requested by the Prosecutor) but does not refer to Article 56 (3) ICC Statute (which includes the possibility for the Pre-Trial Chamber to consult with the Prosecutor on the taking of such measures and the possibility for the Pre-Trial Chamber to take such measures proprio motu).

237 ICC, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, Prosecutor v. Katanga, Situation in the DRC, Case No. ICC-01/04-01/07-475, A. Ch., 13 May 2008, par. 91 – 97 (The Prosecution sought the non-disclosure of the location of the interview, the names of the persons who took the statement and the names of those persons who attended the interview). Consider also the dissenting opinion of Judge Pikis. See ibid., Dissenting Opinion of Judge Pikis, par. 23 (“A witness statement or a summary of it may be used in evidence at the confirmation hearing. The pertinent question is whether a statement lacking the statutory attributes or insignia does qualify as a statement under the Rules. The obligation to keep a record of the circumstances surrounding the making of a written statement in the course of the investigations is not a mere formality but an essential element of the statement itself. It indicates that the statement was taken according to law and as such it has the attributes of authenticity required thereby. Stripped of these attributes, the statement forfeits the character attached to it by law; it is denuded of information that illuminates its provenance. At the same time the defence would be denied material information to which the person under investigation or the accused are entitled in making his/her defence. If power resided with the court to by-pass disclosure of the essential record of a statement, that would be tantamount to by-passing the ordinance of the law. That cannot be. Neither paragraph 2 nor any other provision of rule 81 confer power upon the Court to sidestep the plain provisions of the law, a course that would derail the process from its ordained Course”).

V.3. Internationalised criminal courts and tribunals

V.3.1. The power of the parties to interview witnesses

In stark contrast with the quasi-absence of procedural norms on the questioning of witnesses in the procedural frameworks of the international criminal tribunals, stands the set of detailed provisions regulating the conduct of questioning at the ECCC. This regulation clearly betrays the civil law-style of proceedings at the investigation stage of proceedings. During the preliminary investigation, the Co-Prosecutors, or the judicial police officers and investigators at the Co-Prosecutors’ request, may summon and interview any person who may provide relevant information on the case. When seized, the Co-Investigating Judges hold the power to question witnesses and to record their statements. In a similar vein, the Co-Investigating Judges can delegate this power to judicial police officers or investigators. More dubious is the power they hold to issue an order requesting the Co-Prosecutors to also interrogate witnesses. Such power, to allow only one party to the proceedings to conduct an investigative action on behalf of the impartial and independent Co-Investigating Judges sits uneasy with an inquisitorial procedural model encompassing the institution of an Investigative Judge. The reason for the inclusion of such power remains vague. In practice, because of fair trial considerations, this power is never used.

239 Rule 50 (4) ECCC IR.
240 Article 23 new ECCC Law; Rule 55 (5) (a) ECCC IR. According to Rule 55 (5) (b) ECCC IR, the Co-Investigating Judges can also take the appropriate measures to provide for the safety and support of potential witnesses and other sources.
241 Rule 55 (9), 15 and 16 ECCC IR.
242 Article 23 new ECCC Law.
243 Interview with Co-Investigating Judge Lemonde, ECCC-04, Phnom-Penh, 11 November 2009, p. 6 (Q : Il y a la possibilité pour les co-juges d’instruction de rendre une ordonnance requérant les co-procureurs d’interroger des témoins. Avez-vous rendu une telle ordonnance ? R : “On ne l’utilise jamais. Ça c’est un peu une aberration de la loi.” Q : Mais pourquoi est-ce que cela existe? R : “Je crois que c’est parce que la loi a été rédigée par des gens qui ne connaissent pas le système non plus. C’est incompréhensible, on ne comprend pas pourquoi les juges d'instruction vont s’adresser à une des parties pour faire une partie de leur travail. On n’a jamais utilisé ça et on n’utilisera cela jamais. Jamais on ne fera appel au procureur pour faire des investigations” ; Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 9 (Q: The next question concerns a provision we have been wondering about, which says that the Co-Investigating Judges can order the Co-Prosecutors to interview witnesses in the course of the judicial investigation. Have the Co-Investigating Judges ever used this possibility, and in what situations would they do so? A: “We certainly have not, and we never will, and from our point of view it is a logical impossibility to do so. It would be a serious breach of a number of defendant’s rights.” Q: But then why is that possibility there? A: “Well, I think again it is because the people who wrote the law did not understand the system that they were applying. This, to an extent, is a good example of when the UN administration was asked to create the court, they set it up in such a bizarre way. I think right up until the day the Prosecutor arrived, or a few weeks before, he was under the impression that he would be doing the investigation, and he would recruit the staff”).
Under Cambodian criminal procedure, the Prosecutor has the right to assist in the questioning of witnesses. However, the Internal Rules limit the presence of the Co-Prosecutors to the interrogation of the Charged Person and to confrontations. Again, fairness considerations seem to have guided this deviation from Cambodian criminal procedure. Allowing one of the parties to the proceedings to be present during the questioning of witnesses by the Co-Investigating Judges and putting questions to that witness, although after authorisation by the Co-Investigating Judges, may be considered unfair in that it encroaches upon the equality between the parties. In turn, the Defence is not allowed to interview witnesses. They can only request that the Co-Investigating Judges interview a particular witness.

Instead of prohibiting the presence of the Co-Prosecutors during the questioning of witnesses, another potential solution would be to provide the Defence and Civil Parties with the same right, thus restoring the equality between the parties. Nevertheless, provided that most of the initial interviews with witnesses are conducted outside the premises of the Court, this would cause substantial logistical problems. Indeed, to have all parties present at one time and at one place may well prove to be a logistical nightmare. Budgetary constraints may prevent Co-Prosecutors, Defence and Civil Parties from attending these interviews. However, some efficiency could be gained if the parties were present during the interrogation of witnesses who are going to say something which will likely be contested. One member of the OCIJ suggested that a two-step approach could be followed. This would imply that after the first witness interview, those people who are actually providing information which may be contested are brought to the premises of the Court where a confrontation is organised (to

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244 According to Article 136 of the Cambodian Criminal Procedure Code: “Le procureur du Royaume peut assister à tous les actes d’instruction, en particulier aux interrogatoires du mis en examen, confrontations et auditions.” See also Article 151 of the Cambodian Criminal Procedure Code.

245 Rule 58 (4) ECCC IR.

246 As confirmed by former International Co-Investigating Judge Lemonde. See Interview with Co-Investigating Judge Lemonde, ECCC-64, Phnom-Penh, 11 November 2009, p. 6 (“Le principe quand on entend un témoin c’est qu’il va être entendu en territoire neutre, sans subir les pressions des parties. On ne peut pas bien imaginer que le procureur soit présent sans que la défense soit aussi présente. À ce moment-là, on change le système, on revient à un système en quelque sorte accusatoire, ou les parties ont un rôle plus actif et le juge devient d’une certaine façon un peu spectateur de la lutte entre les parties”).

247 Rule 55 (10), 58 (6) and 66 (1) of the ECCC IR. In general, the Defence are prohibited from conducting their own investigations, see ECCC, OCIJ Memorandum to the Defence, The Case of NUON Chea, Case No. 002/19-09-2007-ECCC/OCIJ, 10 January 2008, p. 2 (“The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action”).

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which the parties can attend). This could prevent the need to re-interview witnesses if one of the parties requests that new questions be put to the witness.

Also the STL Prosecutor holds the power to summon and question witnesses and record their statements. The Prosecutor can seek support from any person, entity or state in order to conduct the questioning of witnesses. Both the Prosecutor and the Head of the Defence Office, at the request of the Defence, can request the Lebanese authorities or other states to have a witness questioned themselves, or by their staff, or jointly. The Prosecutor can be assisted by Lebanese authorities as appropriate. Parties can also request the Pre-Trial Judge to authorise the questioning of witnesses in Lebanon. In line with the ad hoc tribunals and the SCSL, the conditions for this authorisation are not set out in the statutory documents.

Compared to other international criminal tribunals, the Pre-Trial Judge plays a more important role in assisting the parties with the gathering of evidence. This greater role should be understood in light of the autonomous character of the STL Pre-Trial Judge, who cannot sit on the Trial Chamber and consequently does not run the risk of being contaminated through exposure to the evidence at the pre-trial stage. The RPE empower the Pre-Trial Judge to be pro-active.

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248 Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 9.
249 Requests to the Co-Investigating Judges to re-interview a witness can be made by the different parties, but the Co-Investigating Judges hold the discretion to either grant or reject such requests (subject to appeal), see Rule 55 (10) IR.
250 Article 11 (5) STL Statute and Rule 61 (i) of the STL RPE.
251 Rule 14 STL RPE and Rule 18 (B).
253 Article 11 (5) STL Statute.
254 Rule 77 (B) STL RPE (as amended on 5 June 2009).
255 See supra, Chapter 5, V.1.2.
256 Article 2 STL Agreement, Article 8 (1) (a) STL Statute. It should be underlined that this potential ‘greater involvement’ of the Pre-Trial Judge does not confer any juge d’instruction-like powers on the Pre-Trial Judge.
Exceptionally, the Pre-Trial Judge can be involved in the questioning of witnesses. Firstly, if a unique opportunity exists to take evidence or a statement from a witness after the indictment has been confirmed, the Pre-Trial Judge may assist the parties in this endeavour. This possibility is clearly based on the ICC model. The parties can make a request to that extent to the Pre-Trial Judge. Secondly, in exceptional cases, the Pre-trial Judge can summon and interview witnesses himself or request the competent national authorities to do so if the parties or the participating victims are, on a balance of probabilities, unable to do so, and provided that doing so is in the interests of justice. He may do so proprio motu. Thirdly, and unlike other jurisdictions covered, at the request of either parties or a victim, the STL RPE provide for the Pre-Trial Judge to question anonymous witnesses. This course of action is provided when there is a serious risk that a witness or a close relative of the witness would lose his life or suffer grave physical or mental harm as a result of his identity being revealed, and when other protective measures would be insufficient. It is also provided when there is a serious risk that imperative national security interests might be jeopardised should the identity or affiliation of the witness be revealed. The detailed procedure provides for questioning in the absence of the parties and legal representatives of the victims. Nevertheless, the parties and victims can request the Pre-Trial Judge to put certain questions to the witness. On the basis of a provisional transcript, the parties can ask that additional questions be put to the witness. Together with an opinion by the Pre-Trial Judge on the veracity of the witness statement and on the potential for any serious risk in case the name or affiliation of the witness is revealed, the final version will then be given to the parties and the legal representatives.

Finally, and similar to the other international criminal tribunals, in case there is reason to believe that evidence would later not be available for trial, the RPE include a procedure of deposition-taking by the Pre-Trial Judge, on request of a party or proprio motu. The other party and the legal representatives of the victims should have the chance to put questions to

258 The Pre-Trial Judge may take such measures as are necessary to ensure the integrity of the proceedings and the equality of arms, see Rule 89 (I) STL RPE.
259 Rule 92 (A) STL RPE.
260 Rule 92 (C) STL RPE. This decision by the Pre-Trial Judge is subject to appeal as of right (Rule 92 (D)).
261 Rule 93 STL RPE.
262 Rule 93 (B) STL RPE.
263 Rule 93 (C) STL RPE.
264 Rule 93 (D) STL RPE.
265 Rule 123 STL RPE. There is an apparent inconsistency between Rule 123 (A), which seemingly excludes the possibility for the Pre-Trial Judge to take such order proprio motu and Rule 123 (C).
the witness. Deposition may also be given by video-conference. When states object to such procedure, the judicial authorities of the country concerned can collect the evidence on the basis of a bilateral agreement or an ad hoc arrangement.

At the SPSC, the Public Prosecutor likewise held the power to question witnesses. The police could also conduct witness interviews. It is doubtful whether many witnesses were interviewed by the Defence. In many cases, no witnesses were called by the Defence. One example is the Los Palos case, where the Defence blamed this on a lack of time and logistical constraints such as a lack of cars to travel to the districts and to speak with potential witnesses.

V.3.2. The power to compel witnesses to be interviewed

At the ECCC, the Co-Investigating Judges can summon witnesses to an interview. If a witness refuses to appear, the Co-Investigating Judges can issue an order requesting the Judicial police to compel the witness. A witness who refuses to attend an interview before

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266 Rule 124 STL RPE.
267 Rule 125 STL RPE. This alternative requires that the judicial authorities allow the party calling the witness and the other party and, if considered necessary by the Pre-Trial Judge or the Chamber, the legal representatives of the victim to be present during the questioning. When allowed under the national law, the parties should be able to put questions directly to the witness. Questioning proceeds on the basis of questions submitted to that authority (Rule 125 (B) STL RPE). The interview will be video or audio recorded by the Registry, which may also have to provide a transcript (Rule 125 (C) and (E) STL RPE). Subject to the consent of the state concerned, the Pre-Trial Judge, or a Judge appointed by the President of the Chamber may be present, if considered necessary (Rule 125 (D) STL RPE).
268 Section 7.4 (b) TRCP.
269 S. LINTON and C. REIGER, The Evolving Jurisprudence and Practice of East Timor’s Special Panels for Serious Crimes on Admissions of Guilt, Duress and Superior Orders, in «Yearbook of International Humanitarian Law», Vol. 4, 2001, p. 30; C. REIGER and M. WIERDA, The Serious Crimes Process in Timor-Leste: In Retrospect, International Center for Transnational Justice 2006, p. 29 (available at www.ictj.org/static/Prosecutions/Timor.study.pdf, last visited 1 December 2013). It has been stated that no single defence witness was called during the first two years of trials. See S. BIBAS and W.W. BURKE-WHITE, International Idealism Meets Domestic-Criminal Procedure Realism, in «Duke Law Journal», 2010, p. 679 (the authors find an explanation in the fact that the Prosecutor was directly paid by the UN, whereas the defence had to be paid by the poor East-Timorese government).
271 Rule 41 ECCC IR. The minimum time between the issuance of the summons and the appearance of the witness should normally be five days. However, this period does not apply in case the summons concerns a detained person, when the Co-Investigating Judges are conducting interviews in the field or in ‘exceptional circumstances’ (the latter exception was introduced during the 6 March 2009 amendment).
272 Rule 60 (3) ECCC IR.
the Co-Investigating Judges without just excuse, may be sanctioned.\textsuperscript{273} Equally, witnesses who attend interviews but subsequently refuse to produce evidence may be sanctioned.

In turn, at the STL, the Pre-Trial Judge may summon a witness to appear.\textsuperscript{274} A duty for the witness to speak and accompanying judicial power to compel the witness to answer a question (including any exception in case of risk of self-incrimination) is only provided for witness testifying before a \textit{Chamber}.\textsuperscript{275} A witness making a false statement during the investigation, including statements made in front of the Pre-Trial Judge and statements made before national authorities or before the parties, may be sanctioned when that person knows or has reason to know that their statements made in the proceedings before the tribunal may be used as evidence.\textsuperscript{276} However, if such statements were not made under solemn declaration, their statements can only be sanctioned if that statement is accompanied by a formal acknowledgement by the witness that he or she has been made aware of the potential criminal consequences of making a false statement.\textsuperscript{277}

\section*{V.3.3. Procedural safeguards}

\textbf{§ Privilege against self-incrimination}

Similar to the ICC, the Internal Rules of the ECCC provide a \textit{right} against self-incrimination for witnesses.\textsuperscript{278} All witnesses who are interviewed have the right to refuse to answer questions that may tend to incriminate them, not only in front of the Co-Investigating Judges, but also in front of the Co-Prosecutors in the course of preliminary investigations.\textsuperscript{279} The witness should be notified of this right prior to the commencement of the interview.\textsuperscript{280} This privilege is unqualified during any preliminary investigation. During the judicial

\textsuperscript{273} In such case, the Co-Investigating Judges may deal with the matter summarily, conduct further investigations to determine whether sufficient grounds can be found to initiate proceedings or choose to refer the matter to the competent authorities of the United Nations or the Kingdom of Cambodia, see Rule 35 (2) ECCC IR.

\textsuperscript{274} Rule 78 and Rule 77 (A) of the STL RPE. However, jurisprudence confirming the existence of such power is lacking. Following a request by a party, the Chamber or Pre-trial Judge can also request the Registrar to issue a safe-conduct (Rule 81 STL RPE).

\textsuperscript{275} Rule 60bis (A) (ii) and Rule 150 (F) STL RPE.

\textsuperscript{276} Rule 152 (H) \textit{juncto} Rules 93, 123, 125, 156, 157 and 158 STL RPE. However, Rule 152 refers to statements taken “under solemn declaration”; while witnesses interviewed by the parties will normally not make such declaration “under solemn declaration”.

\textsuperscript{277} Rule 60bis (A) (i) STL RPE.

\textsuperscript{278} Rule 28 ECCC IR.

\textsuperscript{279} Rule 28 (1) ECCC IR.

\textsuperscript{280} Rule 28 (2) ECCC IR.
investigation, the witness can be required to answer a question by the Co-Investigating Judges under certain conditions. In case the Co-Investigating Judges consider that a witness should be required to answer a question, they may assure the witness that (1) the response will be kept confidential and will not be disclosed to the public; and / or (2) that it will not be used either directly or indirectly against that person in any subsequent prosecution by the ECCC. The views of the Co-Prosecutors should first be sought. If no assurance is given the witness shall not be required to answer the question. In deciding whether or not to give assurances, a number of considerations should be made by the Co-Investigating Judges, as outlined in the Internal Rules. They include the importance of the anticipated evidence, whether the same evidence can be acquired elsewhere and whether, in the particular circumstance of the case, sufficient protection is available. The Internal Rules further outline the gamut of measures at the Co-Investigating Judges’ disposal to give effect to the assurances provided.

The right to the assistance of counsel for witnesses is limited to the situation where an issue of self-incrimination arises during the proceedings. In such a case, the testimony-taking should be suspended and a lawyer should be provided.

At the STL, a qualified privilege against self-incrimination is only provided at trial. A witness testifying at trial may object to making a statement which may incriminate him or her. The Chamber can compel the witness to answer, provided that the testimony is not used in any subsequent prosecution against the witness except for instances of contempt or false evidence.

§ Other procedural safeguards

A further procedural safeguard in the procedural framework of the ECCC follows from the fundamental principle that 'no form of inducement, physical coercion or threats thereof,
whether directed against the interviewee or others, may be used in any interview.\textsuperscript{286} The sanction is the non-admissibility of the statement recorded and the disciplinary sanctioning of the persons involved in such conduct. In the context of witness interviews, an intriguing question is to what extent the prohibition of inducement can prevent interviewers from holding out promises of protective measures to witnesses. However, it is the practice of the OCIJ not to make such promises.\textsuperscript{287} The precise boundaries of this provision remain to be clarified by the ECCC’s jurisprudence. Lastly, the Internal Rules provide that every witness may request the use of an interpreter where needed.\textsuperscript{288}

V.3.4. Conduct of the interview

At the ECCC, before the start of the interview by the Co-Investigating Judges, witnesses have to take an oath.\textsuperscript{289} A witness giving false evidence under solemn declaration exposes himself or herself to a sanction under Cambodian law.\textsuperscript{290} The Internal Rules provide for exceptions to the general obligation to take the oath before being questioned by the Co-Investigating Judges for certain types of witnesses when they have a close connection to the charged person, accused, civil party or victim (father, mother, ascendants, descendants, brothers, sisters (in law or not), husband or wife (divorced or not)) or on the basis of their age (younger than 14 years old).\textsuperscript{291}

No audio or video recording is prescribed. As noted elsewhere, similar to the ICC, the recording procedure which applies to the interrogation of suspects and charged persons can also be applied to other persons, “in particular where the use of such procedures could assist

\textsuperscript{286} Rule 21 (3) IR. Consider also the discussion of this provision, supra, Chapter 4, IV.5.3.

\textsuperscript{287} Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 9 (“Q: According to Internal Rule 21, there is an absolute prohibition to use any form of inducement during interrogations. In your opinion, would that prevent any promises to be made to witnesses regarding possible protective measures? It is an interesting question which, unfortunately for you, has not arisen in this context, because from the very beginning, the Co-Investigating Judges decided that they would make no promises of protective measures to anybody, and that they would make no general decisions on protective measures. They set a number of criteria based on international case law, as to when protective measures requested by a particular person would be entertained”).

\textsuperscript{288} Rule 30 ECCC IR.

\textsuperscript{289} Rule 24 (1) ECCC IR.

\textsuperscript{290} Rule 36 IR. The Co-Investigating Judges can decide to either deal with the matter summarily, conduct further investigations themselves as to ascertain whether sufficient grounds for instigating proceedings exist or refer the matter to the appropriate authorities of Cambodia or to the United Nations (Rule 35 (2) ECCC IR).

\textsuperscript{291} Rule 24 (2) ECCC IR.
in reducing the subsequent traumatisation of a victim of sexual or gender violence, a child, an elderly person or a person with disabilities in providing their evidence.” Such wording can be interpreted as a stimulus for the Co-Investigating Judges to apply the recording procedure which applies to the interrogation of suspects and charged persons as widely as possible. When testifying in person is not possible and as far as such is not inconsistent with defence rights, live testimony by audio or video-link technology may be allowed by the Co-Investigating Judges in the course of the judicial investigation. A special procedure applies if an interrogated witness is deaf or mute.

A written record should be made of every interview and signed or fingerprinted by the interviewee after reading. If necessary, the record will be read back and if the person refuses to sign, this should be noted on the record. The Internal Rules do not provide further indications in what format these witness statements should be recorded. According to the Cambodian code of criminal procedure, they are taken in the form of a procès-verbal.

Special procedural norms apply to the questioning of a civil party by the Co-Investigating Judges. Being a party to the proceedings, the civil party should be summoned five days before the interview and be given access to the case file within this timeframe. The lawyer should be present during the interrogation, unless this right has been properly waived. If the counsel fails to be present, the interview may continue, but the absence of counsel should be noted in the record. While normally, no other parties will be present during this interrogation, the Co-Investigating Judges can confront the civil party with another party or a witness. During such confrontation, the other parties present may request the Co-Investigating Judges to put a question to the civil party, but the Co-Investigating Judges hold the discretion to deny such request. Civil parties can request to be interviewed, or request the Co-Investigating Judges to interview other witnesses, but the Judges hold discretion whether or not to grant the

292 Rule 25 (4) ECCC IR; see supra, Chapter 4, IV.6.3.
293 Rule 26 ECCC IR.
294 Rule 55 (7) ECCC IR.
295 Article 242 of the Cambodian Code of Criminal Procedure. This article provides that the procès-verbal should reflect truthfully the questions put to the witness, the answers given and the spontaneous declarations made by the witness in the course of the interview. The witness (and the interpreter if present) should sign every page of the witness statement.
296 Rule 59 (1) ECCC IR.
297 Rule 59 (2) ECCC IR.
298 Rule 59 (4) ECCC IR.
request. If they decide to reject the request, they issue a rejection order, which may be appealed before the Pre-Trial Chamber. Under certain conditions and upon issuance of a rogatory letter, investigators can also question civil parties.

With regard to the STL, detailed guidelines or directions on how witness statements should be taken are not provided for. This absence is striking in light of the aforementioned possibilities to rely on witness statements at trial. Nevertheless, the President of the tribunal issued a practice direction (pursuant to Rule 32 (E) STL RPE) on the procedure to be followed for depositions and witness statements to be admissible in lieu of oral evidence.

Finally, in the TRCP, only a few provisions dealt with the conduct of interviews by the Public Prosecutor (or the Defence). Some provisions dealt with some specific rights afforded to the victims of the crimes alleged. More specifically, when a victim of the crime was interviewed, the officer conducting the interview had to inform that victim of the right to be notified when proceedings occurred wherein the victim had a right to be heard. In the event that the victim interviewed was a female victim of sexual assault, such interviews had to be conducted by a female officer unless the victim did not object to a different procedure. Other provisions prohibited the interviewing of some categories of witnesses in relation to the information obtained or revealed by the accused (priest or monk, lawyer and medical professional).

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300 Rule 59 (5) ECCC IR.
301 The civil party (a) must expressly agree thereto, such agreement being mentioned in the written record of interview; (b) when the Civil Party has a lawyer, he or she must waive the lawyer’s presence in a separate written record, as provided in sub-rule 2 above; (c) he or she must be questioned in the absence of any other parties. See Rules 62 (3) (b) and 59 (6) ECCC IR.
302 STL, Practice Direction on the Procedure for Taking Depositions under Rule 126 and 157 and for Taking Witness Statements for Admission in Court under Rule 155, 15 January 2010. The Practice Direction prescribes the procedure for the taking of depositions by the Pre-Trial Judge. The following order should be respected: (i) interrogation of the witness by the requesting party or by the Pre-Trial Judge if he proprio motu requested that the deposition be taken, (ii) the legal representatives of the victims (where permitted), (iii) cross-examination by the other party or parties, (iv) re-examination. The Pre-Trial Judge can ask questions at any time and the accused can normally be present (see Article 1 (5) of the Practice Direction). Audio-visual registration is provided for under Article 1 (9). Besides, the Practice Direction sets out the procedure to be followed for statements to be admitted in lieu of oral evidence. Among others, the Practice Direction stipulates that the party requesting the questioning should ensure witness interviewed should have the possibility to read the statement and should have the possibility to make corrections, after which the final statement is read back to the witness and signed (Article 2 (3) of the Practice Direction). In this regard, it “supplements Rule 155 [and] is directed at ensuring that – in circumstances in which the right to cross-examine is curtailed - witness statements have the indicia of reliability necessary to admit them into evidence under Rule 155.” See STL, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/TC, T. Ch., 30 May 2013, par. 240.
303 Section 14.3 (a) TRCP.
304 Section 14.3 (c) TRCP.
305 Section 35 (3) and 35 (7) TRCP.
VI. INTERNATIONAL HUMAN RIGHTS NORMS

From a human rights perspective, the procedural regulation and the practice of the tribunals regarding the pre-trial questioning of witnesses may not immediately raise any major concerns. However, several human rights issues are relevant here. First, whether or not a privilege from self-incrimination for witnesses can be discerned under human rights law will be examined. The existence of such privilege is important as a positive answer entails that the procedural model of the ICC is to be preferred, because it provides for such procedural safeguard for witnesses during the investigation.\footnote{Also the ECCC provides for such procedural safeguard. Unlike at the ICC, this safeguard is limited in the course of the judicial investigation. See supra, Chapter 5, V.3.3.}

Secondly, the right of the accused to examine witnesses may be at stake if witness statements resulting from pre-trial witness interviews are increasingly admitted into evidence. Could it be argued from a human rights perspective that both parties should be allowed to participate in such investigative action for the resulting statement to be admissible in evidence? If so, the ICC model will again be preferred, since its procedure safeguards this right of the parties.

VI.1. The privilege against self-incrimination for witnesses

The right of the accused not to be compelled to testify against himself, or to confess guilt, was discussed above.\footnote{See supra, Chapter 4, IV.2.1.} This right is laid down in Article 14 (3) (g) ICCPR. While no equivalent right can be found in the ECHR, the *nemo tenetur* principle has been read into Article 6 ECHR by the ECtHR.\footnote{ECtHR, *Saunders v. The United Kingdom*, Application No. 19187/91, Reports 1996-VI, Judgment of 17 December 1996, par. 68.} Notwithstanding the ‘substantive’ rather than formal understanding of a ‘person charged’ by the ECtHR, it is difficult to see how this provision can be applied to witnesses interviewed during the investigation stage of proceedings.

However, at least one author holds the position that as soon as somebody is confronted with questions or with a request for documents which could result in self-incrimination, that person is *de facto* ‘charged’ within the autonomous meaning of Article 6.\footnote{S. TRECHSEL, Human Rights in Criminal Proceedings, Oxford, Oxford University Press, 2005, p. 349.} It is clear that there may be situations where a person is interrogated as a witness, whereas, in the autonomous meaning
of Article 6 (1) of the ECHR, that person should be considered ‘charged’ and should therefore be protected against improper compulsion by the authorities. Consequently, ‘witnesses’ may benefit from the protection of the *nemo tenetur* principle. The Court will apply the “substantially affected” criterion to determine whether or not the witness should be considered ‘charged’ within the meaning of Article 6 (1) ECHR.\(^{310}\)

Several commentators have argued, on the basis of the character and purpose of Article 14 (3) (g) of the ICCPR, that the drafters of the Covenant intended to codify the *nemo tenetur* principle as a general principle of law and were guided by the US Fifth Amendment of the US Constitution. The drafters were not specifically thinking in terms of procedural distinctions between investigation and trial or distinctions between witnesses, suspects and accused persons.\(^{311}\) Consequently, this right should be applied to witnesses as well.

Arguably, further support for the existence of privilege against self-incrimination may be found in the case law of the ECommHR on freedom of expression. In *K v. Austria*, the Commission held that the negative aspect of freedom of expression under Article 10 ECHR includes the freedom to withhold information and that such freedom *in casu* prevails over the interest of the judiciary to obtain evidence from a person who by giving evidence would run the risk of self-incrimination.\(^{312}\) However, this holding predates the recognition of a privilege against self-incrimination by the case law of the ECtHR.\(^{313}\)

The existence of a privilege against self-incrimination for witnesses was considered by one ICTY Judge in a dissenting opinion in the *Tadić* case. The suggestion of the existence of such privilege for witnesses under international human rights law was dismissed by Judge

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\(^{310}\)This term was already discussed at length. See supra, Chapter 2, III.4 and Chapter 4, II.1.4.


\(^{312}\)ECommHR, *K v. Austria*, Application No. 16002/90, Report of 13 October 1992, par. 45-53 (“In the present case, the applicant was forced, by the use of a fine and of detention for five days, to testify against his will. The Commission finds that this constituted an interference with the negative aspect of his right to freedom of expression”). The case was struck out of the list following a friendly settlement.

McDonald.\textsuperscript{314} She held that no such privilege for witnesses can be found under the ICCPR and that no such right has been recognised in the jurisprudence of the ECtHR.\textsuperscript{315}

VI.2. Right to examine witnesses

Two different aspects of the right to confront witnesses are relevant for this chapter on the questioning of witnesses during the investigation. First, (i) the right to examine or to have examined the witnesses against him or her and (ii) the right to obtain the attendance and examination of witnesses under the same conditions as witnesses testifying against him or her.\textsuperscript{316} The right to examine witnesses is found in the Statutes of all jurisdictions under review.\textsuperscript{317}

It follows from the consistent case law of the ECtHR that while in principle, evidence will be produced at public hearings, in light of adversarial argumentation, infringements to this principle are allowed so long as they do not infringe upon the rights of the accused.\textsuperscript{318} Exceptions to the ability to question witnesses in open court are possible. While the defendant should be given the opportunity to challenge and question witnesses against him or her, this opportunity can either be given when witnesses make their statements or at a later stage of the proceedings.\textsuperscript{319} The accused may, thus, be given the possibility to examine the witness outside

\textsuperscript{314} ICTY, Separate and Dissenting Opinion of Judge McDonald on Prosecution Motion for Production of Defence Witness Statements, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch., 27 November 1996, par. 32, fn. 4.

\textsuperscript{315} Ibid., par. 32, fn. 4, stating that the case cited by the Defence (Funke) does not support the Defence’s argument where that case did not deal with witness statements.

\textsuperscript{316} Article 14 (3) (e) ICCPR; Article 6 (3) (d) ECHR. The ACHR limits the application of this right to examine witnesses to witnesses ‘present in the court’: see Article 8 (2) (f) ACHR. The African Charter on Human and Peoples’ Rights does not mention this right.

\textsuperscript{317} Article 21 (4) (e) ICTY Statute, Article 20 (4) (e) ICTR Statute, Article 17 (4) (e) SCSL Statute, Article 16 (4) (e) STL Statute; Article 67 (1) (e) ICC Statute; Article 35 new ECCU Law; Section 6 (3) (g) TRCP.


\textsuperscript{319} Consider e.g. ECtHR, Caka v. Albania, Application No. 44023/02, Judgment of 8 December 2009, par. 100–101 ("Under certain circumstances it may be necessary for the courts to have recourse to statements made during the criminal investigation stage. If the accused had sufficient and adequate opportunity to challenge such statements, at the time they were taken or at a later stage of the proceedings, their use does not run counter to the guarantees of Article 6 §§ 1 and 3 (d)"). See also, among others, ECtHR, Lüdi v. Switzerland, Application No. 12433/86, Judgment of 15 June 1992, par. 47; ECtHR, Lucà v. Italy, Application No. 33354/96, Judgment of 27

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the courtroom or have the witness examined (e.g. by a national judge). However, this does not imply that a right exists under Article 6 (3) (d) of the ECHR for the accused to be present during the interrogation of witnesses during the investigation nor that a right exists to question that witness (directly or indirectly). In a similar vein, the HRC understands this right as encompassing the right for Defence to examine witnesses against it at some stage of the proceedings.

Pre-trial witness examinations are often secret in nature. Still, providing the defendant with the opportunity to challenge witnesses at that stage does not conflict with the right of the defendant to a public hearing, provided that this right only applies at trial. That said, it has rightly been noted that such pre-trial witness examinations may call into question the present understanding of the right to a public hearing, based as it is on the assumption that all evidence could be challenged at trial. Where the right to confront witnesses may be guaranteed outside the courtroom and at the investigation stage, it follows that it is legitimate for the Defence to hear and challenge evidence in a context which may not protect all aspects
For example, when the Prosecution is supervising pre-trial witness interviews, it can legitimately be asked whether or not the defendant’s rights, including the right to challenge witness evidence, would not require a more impartial context, which fully respects defence rights such as equality of arms or the right to an impartial judge. Although it may be objected that the ICC Prosecutor is bound by a principle of objectivity, it was underscored previously how the ECtHR occasionally expressed a certain mistrust about this objectivity, because the Prosecutor is also a ‘party’ to the proceedings. Further, it would seem to follow from the principle of adversarial proceedings that the accused would need to be assisted by counsel at such occasion. Human rights jurisprudence has been reluctant to set out strict safeguards for the pre-trial opportunities to challenge witness evidence. Hence, the stage of proceedings where the defendant is provided with the right to challenge a witness may well define the extent of such an opportunity.

The ECtHR accepted that it may prove necessary for the judicial authorities on certain occasions to refer to depositions taken in the course of the investigation. In this regard, the Court acknowledges the difficulties which may arise in producing witness evidence, for example if the witness can no longer be found. If a conviction is based solely or in a decisive manner on depositions from a witness who has not been examined by the defence, either in the course of the investigation or at trial, the right to a fair trial is violated. This was

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326 Ibid., pp. 98, 345-346 (noting that some “[s]cepticism about any ‘impartial’ role, at least in the sense of Article 6(1) of the ECHR, for the prosecuting authorities is inherent in the equality of arms doctrine and would seem to disqualify prosecution authorities from supervising hearings during the investigation, which are designed to provide the defence with its principal opportunity to challenge the evidence” (original footnotes omitted)).
327 See e.g. ECtHR, Sanoma Uitgevers BV v. The Netherlands, Application No. 38224/03, Judgment (Grand Chamber) of 14 September 2010, par. 93. See the discussion thereof, supra, Chapter 3, III.
329 Ibid., p. 342.
331 ECtHR, A.M. v. Italy, Application No. 37019/97, Judgment of 14 December 1999, par. 25.
confirmed by the ICTY Appeals Chamber. Likewise, it held that the right to cross-
examination is not absolute. It follows that “as a matter of principle nothing bars the
admission of evidence that is not tested or might not be tested through cross-examination.”333
However, “[u]nacceptable infringements of the rights of the defence […] occur when a
conviction is based solely, or in a decisive manner, on the depositions of a witness whom the
accused has had no opportunity to examine or to have examined either during the
investigation or at trial.”334

On some occasions, where convictions were based solely or in a decisive manner on witness
evidence the defendant could not challenge, the ECtHR did not find a violation of Article 6
(3) (d) ECHR. In the S.N. v. Sweden case, no violation of the right to examine witnesses was
found when a witness (whose statements were virtually the only evidence) did not testify at
trial and the defence counsel was absent during the pre-trial police interviews. Rather than to
ask for the postponement of the interview, the defence counsel instead consented not to be
present and did not stipulate the manner in which the interview was to be conducted.335 It has
been argued that it follows that defence counsel should exercise the necessary diligence.336 In
the Solakov case, the Court did not conclude a violation of Article 6 (3) (d) ECHR had
occurred even though some witness statements which played an important role in the finding
of guilt were taken in the US following a rogatory letter in the absence of the defendant’s
counsels.337 The counsels of the defendant had been summoned but they chose not to attend
the hearing nor did they expressly provide any question the defendant would like to put to the
witness.338

Consequently, under international human rights law witness statements resulting from pre-
trial interviews may normally be admitted without the possibility for the Defence to examine
these witnesses as long as the finding of guilt is not based ‘solely’ or ‘in a decisive manner’

333 ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007, par. 52 - 55; ICTY, Judgement, Prosecutor v. Haraqija and Morina, Case No. IT-04-84-R77.4-A, A. Ch., 23 July 2009, par. 61.
334 ICTY, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007, par. 53, 61.
338 Ibid., par. 60, 62.
on these witness statements. At first sight, Rule 92bis of the ICTY, ICTR and SCSL RPE may be held to be in accordance with this rule insofar that it only allows for the admission without possibility of cross-examination of witness statements that go to proof of a matter other than the acts or conduct of the accused as charged in the indictment. Hence, the verdict can never be based solely or in a decisive manner on witness evidence that could not be confronted by the Defence. In a similar vein, the admission of witness statements without possibility of cross-examination under Rule 92quater (unavailable persons) and Rule 92quinquies (persons subjected to interference) would be in accordance with international human rights law as long as it is not used to admit witness statements to the extent that a conviction is based solely or in a decisive manner on these witness statements.

However, some commentators are sceptical on the compliance of Rule 92bis with international human rights law. For example, ROBINSON argues that the amount of Rule 92bis evidence admitted may prejudice the fairness of the trial.\(^\text{339}\) He holds that in the absence of a dossier, the Trial Chamber lacks sufficient information to determine whether or not cross-examination is necessary.\(^\text{340}\) Such a system would be acceptable in a civil law system where the Judges have more information on the facts and on the case and are in a position to be more proactive in asking questions which can compensate for the absence of cross-examination.\(^\text{341}\) Hence, the underlying problem is the superimposition of a civil-law feature into a predominantly common-law system, without making the necessary adjustments.\(^\text{342}\) Other commentators note that the tendency of admitting prior-recorded witness statements at trial may have led to an erosion of the accused’s right to confront witnesses.\(^\text{343}\)

It is to be observed that divergent answers have been given in the case law as to what exactly constitutes the ‘acts and conduct’ of the accused, for which no written witness statements can

\(^{339}\) P.L. ROBINSON, Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY, in «Journal of International Criminal Justice», Vol. 3, 2005, pp. 1042-1043 (“Although the witness statement does not go to proof of the acts and conduct of the accused […] it may yet be of importance to the case of an accused who may wish to cross-examine its maker to show that the incident did not take place at all, or for some other reason relevant to his case”). Consider also S. KAY, The Move from Oral Evidence to Written Evidence, in «Journal of International Criminal Justice», Vol. 2, 2004, p. 496 (noting that as a consequence of rule amendments and the case law of the ICTY, the right to confront witnesses has been ‘left to be but an echo of its worth”).


\(^{341}\) Ibid., pp. 1045 – 1046.

\(^{342}\) Ibid., p. 1046.

be admitted *in lieu* of oral evidence. For example, in *Karemera et al.*, ICTR Trial Chamber III narrowly interpreted this notion as to also include acts and conduct of subordinates, while other jurisprudence would allow for its admission. 344 However, the Chamber later reconsidered this stance. 345 It may indeed be difficult to distinguish between evidence going to ‘the acts and conduct of the accused’ and other evidence when extended forms of criminal liability are relied upon. 346 Firstly, witness statements may refer to the acts and conduct of immediate proximate subordinates. Secondly, evidence so admitted may still be crucial in establishing the ‘crime base’, and still be decisive with regard to the conviction. 347

Nonetheless, it is unclear from the above argumentation how Rule 92bis precisely violates the right to a fair trial and the right of the defendant to challenge witnesses. As indicated by JACKSON, it may indeed be difficult to argue in the abstract that the admission of Rule 92bis statements is unfair upon the accused. Overall, the Trial Chamber retains considerable discretion whether or not to require the witness to appear for cross-examination. It follows that “[s]o long as tribunals are sensitive to the requirement that convictions are not based

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344 ICTR, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, T. Ch. III, 11 December 2006, par. 19 – 21 (“Having reviewed all of the material sought to be admitted, the Chamber notes that none of the rapes and/or sexual assaults alleged are alleged to have been physically perpetrated by any of the Accused in this case. Rather, all of the rapes and/or sexual assaults are alleged to have been physically perpetrated by Interahamwe and militiamen, and not by any of the Accused in this case. […] However, according to the forms of liability pleaded in the Indictment […] the evidence is to be relied upon to prove that rapes were committed on a widespread and systematic basis by the Accused’s subordinates and/or co-perpetrators. These allegations are so pivotal to the Prosecution’s case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses. The Prosecution Motion falls to be rejected” (emphasis added)). However, Compare e.g. ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 9 – 14. See further Y. MCDERMOTT, The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis, in «Leiden Journal of International Law», Vol. 26, 2013, p. 977.

345 As a consequence, and after the Prosecution reduced the number of witnesses whose evidence the Prosecution sought to admit in written form, the Trial Chamber decided to reconsider its decision of 11 December 2006 and to admit 16 witness statements in written form. See ICTR, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Evidence and Admission of the Testimony of Witness GAY, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, T. Ch. III, 28 September 2007, par. 24.


substantially upon uncross-examined evidence, they are unlikely to fall foul of human rights law.”

VII. CHALLENGES OF INTERNATIONAL CRIMINAL INVESTIGATIONS

A recurring issue which has plagued the ad hoc tribunals is the occurrence of discrepancies between the evidence given by a witness in the courtroom and evidence which was given to investigators during pre-trial interviews which was recorded in witness’ statements. Such inconsistencies are widespread. With regard to the prevalence of such inconsistencies in a number of international prosecutions, COMBS concluded that:

“Inconsistencies and omissions such as the ones I have described would be troubling if they occurred only once in a while, but in fact they are commonplace at all tribunals. I reviewed the testimony of prosecution witnesses in three of the four SCSL cases and in a number of Special Panels and ICTR cases. In some of these cases, the testimony of virtually every witness featured some inconsistencies or omissions between the witness’ statements and testimony. More importantly in all of these cases, a large proportion of witnesses testified in a way that was seriously inconsistent with their previous statements. At the SCSL, for instance, 54 percent of AFRC prosecution fact witnesses testified in a way that I considered seriously inconsistent with those witnesses’ pretrial statements. The proportion was 53 percent in the RUF case and 35 percent in the CDF case.”

This raises pertinent questions as to the reliability of statements produced as a result of the questioning of witnesses during the investigation. COMBS, on the basis of her study of the fact-finding by the ICTR, SCSL and SPSC, concluded that international criminal courts and tribunals face similar educational, cultural and linguistic divergences between staff and

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348 Ibid., p. 31 (the author adds that “[t]his does not, however, dispose of the question whether the admission of large amounts of written evidence at trial which has not been subject to testing before or at trial creates the best foundation for enabling tribunals to make reliable findings of fact. One of the reasons why common law adversarial systems have been traditionally suspicious of written statements is because there are well-founded doubts about the reliability of statements taken by parties for the purpose of litigation”). It cannot be denied that a certain level of uncertainty surrounds the notions of ‘sole’ or ‘decisive’ as employed by the ECtHR. On this issue, consider J.D. JACKSON and S.J. SUMMERS, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge, Cambridge University Press, 2012, pp. 338 – 342.

witnesses. She argues that all of these factors explain the inconsistencies which arise between pre-trial witness statements and their testimony in court. The same factors can be found in the jurisprudence of the ad hoc tribunals and were indicated to the author in interviews with staff of the ICTR and the ECCC.

Doubtless, a major challenge to the conduct of pre-trial witness interviews relates to language and interpretation. In fact, witnesses themselves often attribute these inconsistencies to interpretation errors. They often seek to explain inconsistencies between earlier statements and their oral testimony by arguing that the earlier testimony had not been properly transcribed. Normally, questions are first translated from English to the native language of the witness by an interpreter, while an interpreter translates it into English or French. The

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350 Ibid., p. 5.
351 Ibid., p. 106.
352 Consider e.g. Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6 (“Q. What are, in your personal opinion, the main obstacles for the OTP in conducting investigations? A. “I think poor investigations are the main obstacle that we have, and not having a well-trained police force that you can send out and take proper statements that actually reflect what the witness said. Questions of interpretation, languages, questions of the investigator not understanding the background of the witness in terms of literacy and being able to account for what happened. All the things that are taken for granted in a functioning jurisdiction that has been up and running for the last couple of hundred years”). See the additional references in footnotes below.
353 See e.g. Interview with a member of the OTP, ICTR-13, Arusha, 21 May 2008, p. 4; Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6 (“You have an endless stream of witnesses saying, “that’s not what I told them.” “But that’s what you signed.” “Yes, but it’s been translated into Kinyarwanda.” It is ridiculous. Then, of course, from the Defence point of view they will say that there are all these inconsistencies. This witness cannot be believed”); Interview with a member of the OTP, ICTR-15, Arusha, 29 May 2008, p. 6; Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 3; Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 4. Consider also J. JACKSON, Finding the Best Epistemic Fit for International Criminal Tribunals, in «Journal of International Criminal Justice», Vol. 7, 2009, p. 31 (“there are grave dangers of errors creeping into the fact-finding process where different languages are at play”); A. ZAHAR, Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals, in C. STAHN and L. VAN DEN HERIK (eds.), Future Perspectives on International Criminal Justice, Cambridge, Cambridge University Press, 2010, p. 602. For an account of the problems related to witness evidence and interpretation at trial, see R. CRYER, Witness Evidence Before International Criminal Tribunals, in «The Law and Practice of International Courts and Tribunals», Vol. 3, 2003, pp. 420-429.
354 N.A. COMBS, Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions, Cambridge, Cambridge University Press, 2010, pp. 66 – 79, 175; Consider also BUISMAN, who asserts that translations and interpretations may also be problematic for the ICC, which has to face a great number of different languages, including non-written local or tribal languages, such as Zaghawa, which is spoken by a tribe in Sudan. See C. BUISMAN, Ascertainment of the Truth in International Criminal Justice, 2012 (available at: http://bura.brunel.ac.uk/handle/2438/6555, last visited 18 November 2013), p. 334.
355 Consider e.g. ICTR, Trial Record, Prosecutor v. Ntakirutimana and Ntakirutimana, Case Nos. ICTR-96-10-T and ICTR-96-17-T, 27 September 2001, pp. 112-113.
356 See e.g. SCSL, Transcript, Prosecutor v. Norman et al., Case No. SCSL-04-14, T. Ch. I, 2 March 2005, pp. 7- 8 (a prosecution investigator testified that the questions were first translated from English to Krio by an interpreter. Subsequently, the response in Krio was translated back to English. At the end, the witness was asked if he or she had any questions for the investigator. Then, the statement was read back to the witness in Krio).
investigator will then take notes in his or her own language. Subsequently, the statement made by the witness is prepared in English and read back to the witness in English and translated orally in the witness’ native language. In a next step, the witness is requested to sign the statement.\textsuperscript{357} Neither the interview nor the reading back of the statement is tape-recorded to ensure the accuracy of the oral translation.\textsuperscript{358} Hence, no record is available afterwards to check what the witness has said in his or her own language.\textsuperscript{359} Occasionally, interpretation may even be more complex. In some cases, double interpretation is required. For example, because of the lack of English-Kinyarwanda interpreters, ICTR interpretation happened from Kinyarwanda over French to English. Similarly, at the ICC, interpretation from Lingala and Swahili over French to English, by means of a French relay proved to be necessary. It is evident that a double round of interpretation considerably increases the risk of miscommunications.\textsuperscript{360}

The problems regarding interpretation were addressed by an ICTR Trial Chamber in \textit{Akayesu}. The Trial Chamber acknowledged that interpretation of oral evidence from Kinyarwanda into one of the official languages has been a great challenge to the trial proceedings “due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English.”\textsuperscript{361} Important syntactical and grammatical differences exist between Kinyarwanda, English and French.\textsuperscript{362} Other language difficulties add up to the problem of translations. These include the use of euphemistic language, cultural restraints to discuss certain issues, etc.\textsuperscript{363}

Similar challenges arguably arise in the context of pre-trial interviews with investigators. For example, at the ECCC, investigators faced substantial problems in interviewing witnesses due

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\textsuperscript{357} Defence counsel B. Gumpert criticizes this “atrocious methodology” and qualifies it as an “outrageously unreliable system for gathering evidence”, see Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 13.
\textsuperscript{358} ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), Prosecutor v. Galić, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 30, fn. 56; ICTY, Decision on Appeal Regarding Statement of Deceased Witness, Prosecutor v. Kordić and Čerkez, A. Ch., 21 July 2000, par. 27.
\textsuperscript{359} Interview with Mr. Gumpert, Defence Counsel, ICTR-20, Arusha, 22 May 2008, p. 13; Interview with Mr. Peter Robinson, Defence Counsel, ICTR-18, Arusha, 22 May 2008, p. 5 (arguing that such recording is important as it allows to verify whether the witness really said something or whether the investigator wrongly noted it down in case of inconsistent prior statements).
\end{footnotes}
to the absence of distinctions between singular/plural, feminine/masculine, and by the absence of any tense and conjugation of verbs in the Khmer language.\textsuperscript{364}

In addition to the factors set out above, errors made by investigators should be added.\textsuperscript{365} Stories of incompetent or lazy investigators are common but difficult to verify.\textsuperscript{366} The involvement of third actors, lacking proper training, in early ICTR investigations, was discussed above.\textsuperscript{367} COMBS refers to two instances, before the ICTR and SPSC respectively, where an investigator submitted the same statement for two or more witnesses.\textsuperscript{368} In addition, she cites one senior trial attorney in the \textit{CDF} case who reported that witness statements were of such bad quality as to necessitate the \textit{CDF} trial team to re-interview nearly every witness.\textsuperscript{369} In the \textit{Šešelj} case at the ICTY, following a motion by the Defence, an \textit{amicus curiae} was even appointed with the mandate to “investigate possible intimidation or pressure, albeit indirect, exerted by certain investigators for the Prosecution in this case and to investigate techniques used by these investigators to obtain preliminary written statements from Witnesses.”\textsuperscript{370} The \textit{amicus} concluded that there were no sufficient grounds to initiate

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\item \textsuperscript{364} Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13 (“The result is that if you ask a question, for example, “Do you know what happened here?” a person might say, “Yes, some people came and killed a group of people and we all saw that.” But the written sentence would be open to interpretation as “A person came and killed one person and I saw it” or any other possible interpretation of that. Which means that the investigator that has to be conscious of that question, they have to come back and say, “How many of them were they? How many people were killed?” You have to know. If you do not speak Khmer, the interpreter has to choose one option when translating to English or French, plural or singular or whatever. And they will do that based on their own understanding of the context of what the person is talking about. But they might get it wrong. So you have to systematically go back and verify every single aspect of the question.
\item \textsuperscript{366} Ibid., p. 126.
\item \textsuperscript{367} See supra, Chapter 2, VII.1.
\item \textsuperscript{368} See SPSC, Judgement, \textit{Prosecutor v. Ena and Ena}, Case No. 5/2002, SPSC, 23 March 2004, par. 67 (“Statements taken in March 2002 from four key Prosecution witnesses do mention the involvement of Carlos Ena. However, the Court expresses its concern that two of the statements (the statement of Laurinda Oki and Maria Lafu Ulan, both dated 20 March 2002) are identical. Other than the name, age and time of interview, the text of the statements are identical- even the spacing and punctuation marks are replicated. The first five paragraphs of the statement of Terezinha Punef (also taken on 20 March 2002) are identical to these two statements, while the remaining paragraphs of the statement display striking similarities in terms of words, phrasing and contents”); ICTR, Judgement, \textit{Prosecutor v. Akayesu}, Case No. ICTR-94-6-T, T. Ch. I, 2 September 1998, par. 443 (“The Chamber notes that the written statements of these two witnesses, prepared and submitted by the Defence, are identical”).
\item \textsuperscript{370} ICTY, Redacted Version of the “Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav \textit{Šešelj}’s Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Reitzlaff and Daniel Saxon”, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, T. Ch. III, 29 June 2010, p. 11.
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contempt proceedings against any identifiable person.  This conclusion was adopted by the Trial Chamber. Hence, no contempt proceedings were initiated.

Education and literacy may be major impediments with regard to the quality of pre-trial witness statements. For example, on the basis of witnesses’ own responses when asked by defence counsel and prosecutors (in court) about their level of schooling, COMBS determined that in cases before the SCSL illiteracy rates of witnesses varied between 33 and 48 percent. It follows that many of the witnesses interviewed are unable to read the statements they made to investigators, preventing them from indicating any inaccuracies in the recording of the interview by the investigator. Overall, “many witnesses do not entirely understand what they are doing when they provide the prosecution with a statement.”

Also cultural divergences are one of the major causes of inconsistencies between pre-trial witness statements and witness testimony at trial. Cultural divergences are a major challenge in taking witness statements. For example, Western indications of time and space may have little meaning to the witnesses and therefore be the cause of many

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371 ICTY, Decision on Vojislav Šešelj’s Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 22 December 2011, par. 23.
372 Presiding Judge Antonetti attached a Seperate Opinion, highly critical of the work of the amicus and questioning the method (not the outcome) of the amicus curiae report. See ibid., Separate Opinion of Presiding Judge Jean-Claude Antonetti, p. 34 (“In conclusion, I delegated all my discretionary powers to the amicus curiae, insisting that he conduct a serious and thorough investigation. I expected a lot from him. We have to admit, unfortunately, that he failed to achieve his objective. I am sorry about that, but it is unfortunately too late to restart the machine and, at this important moment, it is also highly likely that after a full investigation, I would have arrived at the same conclusion as the amicus curiae, even though it should have been arrived at in accordance with the rules of the profession”).
373 Interview with Ms. Christine Graham of the OTP, ICTR-14, Arusha, 28 May 2008, p. 6.
375 Ibid., p. 122.
376 Ibid., p. 41.
inconsistencies. This may require creative solutions. One member of the ECCC Office of the Co-Investigating Judges observed how witnesses may not recall the exact date, but may remember the part of the rice planting process that was going on, or may recall that an event happened during the wheat picking process. Another example of a problem encountered by investigators of the ECCC is the fact that witnesses interviewed tended to agree with someone in a position of authority. Witnesses may also be reluctant or uncomfortable to discuss certain issues during the initial interview. It may often be impossible for fact-finders to discern when cultural divergences explain inconsistencies. One sensible solution to reduce the cultural (and linguistic) distance between investigators and witnesses, is to employ local investigators. In such cases, oversight by the court or tribunal investigator is necessary.

Additional factors may be noted. Differences between pre-trial witness statements and testimony at trial can further be explained by the passage of time as the human memory erodes over time. Because trials of international crimes as well as the evidence gathering often take place considerable time after the events, they are especially vulnerable to this. Doubtless, the time interval has an influence on the memory of the witness. The witness will probably

380 Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13.
381 Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13.
384 This was acknowledged by a member of the ICTR OTP to the author: “Then of course you find there is very often a challenge of communication and understanding between our investigators and the people on the ground. Although many or even most of our investigators come from Africa, they come from different regions with different traditions and they speak different languages. It is not different from bringing someone from Europe to investigate a case in Rwanda. You can bring me from Gambia and still have the same difficulty of communication. What we have tried to do is to employ Rwandan investigators at the lower level, as assistant investigators. Of course, we need to make sure that they have not been involved in these offences.” Interview with a member of the OTP, ICTR-09, Arusha, 20 May 2008, p. 4. See also Interview with a member of the OCIJ, ECCC-03, Phnom-Penh, 16 November 2009, p. 13.
385 J. JACKSON and Y. M’BOGE, The effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”, in «Leiden Journal of International Law», Vol. 26, 2013, p. 959 (the authors refer to the interview with an ICTR Defence Counsel. The interviewee noted that “You cannot just rely on a local investigator because…they’re not very familiar with how it works on the court…also how to take statements properly, which is very important”).
386 The most extreme example in that regard is the ECCC, a tribunal whose temporal jurisdiction ends thirty years ago.
387 Consider e.g. Interview with a member of the OTP, ICTR-10, Arusha, 21 May 2008, p. 5 (“Some of the witnesses no longer remember all the details of what happened during the genocide” (when asked about the
have read or heard about some of the defendants, or could have been in touch with other witnesses. Talking about the events may change the details of the witness’ recollection. The traumatic situation in which the witnesses found themselves during the events about which they testify and the subsequent therapy they may get is yet another factor which can negatively influence the witness’ recollection. Discrepancies in the statements have also been explained by differences in the questions put to the witness by the investigator and at trial.

Overall, the accumulated effect of these shortcomings should not be underestimated. As noted by COMBS, the practice of Trial Chambers is “to place little weight on witness statements and explain away all but the most serious discrepancies between their statements and subsequent testimony.” However, this “inclination to minimize the relevance of pre-trial statements given the shoddy nature of some statement taking” […] “eliminate[s] a valuable mechanism for assessing witness credibility and” […] “substantially disadvantage[s] defendants.” This suggests that it is important to improve the pre-trial statement taking process. In line with what was said previously, it is also important that witness interviews are transcribed (rather than summarised), and that this includes all questions asked and answers
An audio or video recording of the witness interview is preferable. Further, witness interviews should be carefully prepared and qualified investigators should be employed.393

On top of these problems associated with the collection of witness testimony come the many logistical and other obstacles in obtaining witness evidence on the ground. Many ICTR and SCSL defense councils interviewed confirmed that getting access to witnesses was a major obstacle faced in conducting their investigations.394 In particular, many potential witnesses were afraid to be associated with the Defence.395 Consequently, a rapport first had to be established with these individuals, before they would agree to testify.396 More alarming, ICTR Defence counsel routinely referred to harassment or intimidation by the Rwandese authorities as an important challenge in collecting witness evidence.397 They refer to instances where witnesses who were contacted by or testified on behalf of the Defence (or their families) were not willing to testify.

393 In this regard, consider BUISMAN, who seems to maintain that investigative deficits are rather caused by the poor quality of some persons working with these institutions, rather than to be explained by cultural differences C. BUISMAN, Ascertainment of the Truth in International Criminal Justice, 2012, p. 358 (available at: http://bura.brunel.ac.uk/handle/2438/6555, last visited 18 November 2013).

394 Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 3 (“But finding the witnesses in the hills in Rwanda is tough. Just physically getting there, getting them to talk to you”); Interview with a Defence Counsel at the ICTR, ICTR-25, Arusha, 29 May 2008, p. 3; Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 4 (naming the practical difficulties of getting witnesses the biggest challenge in conducting investigations); Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, pp. 11-12.

395 Consider e.g. Interview with a Defence Counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 7 (“people being afraid to talk for one reason or another. They do not want to be seen associated with [name of defendant]”); Interview with Dr. O’Shea, Defence Counsel, ICTR-23, Arusha, 28 May 2008, p. 7 (“As defence counsel, you will find that actually getting witnesses is quite difficult within the context of this Tribunal. People are very fearful to come here. They are very fearful that the authorities know they have spoken to us. The procedure of bringing a witness here involves the Rwandan authorities. You cannot just bring a witness here. The Rwandan authorities know when a witness is brought here, unless you bring a witness here surreptitiously. So people are very fearful, and I think the authorities feed on that fear. It is not very tangible, you cannot put your finger on it sometimes, you know?”); Interview with Mr. Gershom Otachi BW’Omanwa, Defence Counsel, ICTR-27, Arusha, 30 May 2008, p. 4 (“In fact, we have had – many defence teams have had problems getting witnesses from Rwanda, because there is a background of the fact that the current system in Rwanda was a force that was fighting our clients. These were protagonists. And as things stand we feel that, you know, the side that won the war is in charge of everything. It is like there is a certain influence they have on who can come and what they can say. In such a way that also, sometimes defense witnesses say that they are apprehensive, you know, they really fear coming to testify”).

396 As a member of a defence team describes, it, “People who live through wars, the ones who did not flee, had particular skills at surviving, if they lived inside a conflict situation, and none of those skills involve trusting people who randomly show up and say they are there to help you out. So it took a long time to build trust with defence witnesses”). See Interview with a Defence Counsel at the SCSL, SCSL-04, Freetown, 19-20 October 2009, p. 24.

397 Consider e.g. Interview with a Defence Counsel of the ICTR, ICTR-26, Arusha, 29 May 2008, p. 8 (“it is very hard for us in general to be able to guarantee, to the degree that is necessary, the safety, security and the confidentiality of these witnesses. That, to me, is the biggest problem. There are countless examples of witnesses who have been harassed or their families have been harassed. Or after they testify, immigration in country X goes after them. No matter how private your discussions are with them, how careful you are, something happens with the information”).
later arrested or tried in proceedings by the Gacaca courts. In general, the capacity of the international courts and tribunals to protect these witnesses appears to be limited. One defence counsel of the SCSL likewise confirmed that similar problems existed at the SCSL, but described how these problems were being resolved, in particular with the change of government.

Other shortcomings indicated by the Defence, including the absence of sufficient investigators or means of transportation relate to the general issue of the presence/lack of adequate resources. In this regard, it is important that the particularities of the case are taken into consideration. For example, because ICTR Defence witnesses are geographically spread out,

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398 Interview with Peter Zaduk, Defence Counsel, ICTR-22, Arusha, 26 May 2008, p. 6 (“the government of Rwanda controls most of the witnesses who are still in the country, including the defense witnesses, many of whom are very fearful about testifying. We had a witness in our case, a very helpful witness to us, who came in November 2006 to testify from Rwanda, and did not testify at that session for one reason or another, and he was brought back in February of 2007 to give his evidence. In the meantime, he had been arrested on a murder that had occurred during the genocide in 1994, brought to a jurisdiction different than where the crime arose in Rwanda, tried before the Gacaca court in one day on the basis of the evidence of one witness who did not say anything against him until after he came here to Arusha to testify for the Defense, and then he was sentenced to 25 years. That was just intimidation of our witness and intimidation of other witnesses who would want to cooperate with the Defense. That has been a recurring problem all the way through this”); Interview with Mr. Tom Moran, Defence counsel, ICTR-24, Arusha, 29 May 2008, p. 3 (“there is pressure, either direct or indirect or felt, on witnesses”); Interview with a Defence Counsel of the ICTR, ICTR-26, Arusha, 29 May 2008, p. 8 (“If he goes back, not only is he followed by immigration, but if it is Rwanda, they also have these Gacaca proceedings. Now, can I show you a correlation between the charges there (in Rwanda) and having testified here? No, I have never made a study. But the empirical evidence is extremely distressing, especially for those who were penalized”); Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 4 (“You know the Rwandan government keeps a list of alleged perpetrators of the genocide. And if you conduct a study of that list from 1996 to date, you will see in the variations and changes in the list people who have not at specific locations from the outset, but as soon as they accept to come to testify on behalf of the defendant, they became suspects in the alleged perpetration of crimes in those areas in which they never visited. You also find that most of our defense investigators are Rwandese citizens who have been of help to us, and many of them have had to withdraw or leave because the Rwandan government, as soon as it finds out that they are investigating for the Defense, accuses them of committing genocide. And there are many cases of people who were not in Rwanda at the time of the crimes, some of whom were still too young, but nevertheless, they still put their names on the list. This list is used as a sort of blackmail against Rwandan citizens who would like to assist the Defense” […] “this Gacaca court procedure is used to intimidate potential witnesses, in the sense that in the Gacaca proceedings, anybody can come out and denounce you: “Yes, this person burned down my home”, or “This person intimidated me during the genocide”. Because of the nature of proceedings, the system uses it to intimidate and imprison any potential witnesses. As soon as somebody appears on your witness list, the next thing you hear is that this person is detained in the Gacaca proceedings”)).

399 Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 6 (“In the first few years from 2003 to 2006, there was a problem of witnesses being frightened of the government, being frightened of associating with the rebels which is an understandable fear. Once there was some distance between the end of the conflict and the trial process that became easier. It certainly became much easier when there was a change of government. There was a real noticeable change when the government changed, that was a big thing”).

400 Consider e.g. Interview with Mr. Taku, Defence counsel, ICTR-21, Arusha, 23 May 2008, p. 7; Interview with Dr. O’Shea, Defence Counsel, ICTR-23, Arusha, 28 May 2008, pp. 3-4.
more resources will be required. Finally, some obstacles in collecting witness evidence are rather peculiar to particular investigations. For example, one issue which plagued investigations by the Taylor defence team were the UN sanctions, including a travel ban and frozen assets, which targeted persons associated with Charles Taylor and which had “a chilling effect” on the Defence’s ability to talk to and interview witnesses in Liberia. Witnesses were afraid to end on one of the lists maintained by the Security Council Sanctions Committee.

VIII. COMPARATIVE ANALYSIS: SOME TENTATIVE CONCLUSIONS AND RECOMMENDATIONS

The preceding analysis allows us to draw some tentative conclusions on the questioning of witnesses in the course of the investigation. Only a few procedural provisions are commonly shared by all tribunals scrutinised and thus firmly established at the international level. Evidently, the procedural framework of all tribunals includes the prosecutorial power to question witnesses. At the ECCC, this power is limited in principle to the preliminary examination. In the course of the judicial investigation, the Co-Investigating Judges are empowered to interview witnesses. In the absence of an express power for the Defence to question witnesses, such a power derives from the accused’s right to examine witnesses, the principle of equality of arms, and the right of the accused to have adequate time and facilities for the preparation of his or her defence. At the ECCC, the Defence is prohibited from interviewing witnesses and can only undertake preliminary inquiries in order to exercise its right to request the Co-Investigating Judges to undertake investigative actions (and interview witnesses).

402 Interview with a Defence counsel at the SCSL, SCSL-03, Freetown, 20 October 2009, p. 7 (“basically anyone associated with Charles Taylor, as determined by the Security Council, can be placed on one of those lists and they are not allowed to travel outside of Liberia or to use money or invest money outside of Liberia. Again it is one of the situations where there are no reasons given, you wake up one morning and find your name on the list and there is no reason given why you were put on the list and the procedure to delist yourself basically requires the intervention of another country writing to the Security Council on your behalf. It is a very long and convoluted process, so understandably people who are already on the list that we could approach […] say, “Look, if I talk to you now, I may never come off this list — it will see me as continuing my links, whatever they be, with Charles Taylor and therefore I’m not willing to take that risk.” People who are not on the list say: “I’m not coming anywhere near the Taylor defence team because if I am seen to be showing up and testifying for the Defence, that would be seen as if I do have links to Charles Taylor and maybe next year I will wake up and there will be my name as well.” And that has been a problem that we have not really known how to deal with to be quite honest because it is not as if the Special Court has any power to tell the Security Council not to put witness names on the list or not to put people under a travel ban or assets freeze that come and testify before the Court”).
Furthermore, it can be concluded that all tribunals and courts under review allow for the admission of out-of-court witness statements resulting from pre-trial witness interviews into evidence at trial, albeit to varying extents.

Both the ad hoc tribunals and the SCSL can compel witnesses to be interviewed by the Prosecutor or the Defence during the investigation, under certain conditions. In turn, the ICC lacks the power to directly compel the appearance of individuals for questioning in the context of investigations. Also the ECCC and the STL recognise the possibility to compel witnesses to be interviewed by the Co-Investigating Judges (ECCC), or by the Defence, Prosecutor, or Pre-Trial Judge (STL).

Only the ICC and the ECCC contain a duty incumbent on the Prosecutor to compile a record of every interview. The procedural frameworks of the ad hoc tribunals, the SCSL and the STL do not provide for such obligation, and the ICTY jurisprudence dismissed the existence of such obligation. However, it was argued how such obligation should derive from disclosure obligations of the Prosecutor and is a prerequisite for the meaningful exercise of defence rights. Whereas none of the procedural frameworks of the tribunals under review require an audio or video recording, the ECCC and ICC procedural framework encourage such procedure, especially in relation to vulnerable witnesses. The STL only provides for the audio-visual recording of witness interviews when a deposition is taken by the Pre-Trial Judge or by the national state.

The importance of an audio or video recording lies where it enhances the transparency of the witness statement recording process and allows for ex post control over the conduct of the interview. It enables the Court to check what was said during the interview, the manner in which it was said and how it was perceived by the witness. In addition, it allows for any errors in the interpretation of questions and answers to be detected. The significance thereof should be understood in light of existing linguistic, cultural and other barriers in collecting witness evidence by international courts and tribunals. Hence, it is recommended that a duty to compile a record of witness statements as well as a duty to provide an audio or video recording of witness interviews, as far as practicably possible, are expressly provided for in international criminal procedure.
Only the procedural framework of the ICC and the ECCC provide for detailed procedural rules for taking witness statements. The case law of the ad hoc tribunals provides us with ‘guidelines’ as to the ideal standard for taking witness statements. It was discussed above how pre-trial witness statements are increasingly allowed in evidence at trial. In light of this evolution, clear, public and standardised guidelines or SOP’s should be provided for at all courts and tribunals. They should clearly outline the procedure for the witness statement taking process. Judges may assist in this process and draw the boundaries by setting out the principles which are to apply. 403 These guidelines would enhance the transparency of the questioning and statement-recording processes. It is important that the transcript is a full witness statement and includes all questions which were put to the witness. Such guidelines would allow for Judges to ex post check whether these guidelines have in fact been upheld by the investigators. An additional need for such guidelines stems from the fact that the investigators come from different countries and have different legal backgrounds. As BERGSMO and KEEGAN put it:

“In a Prosecutor’s Office which includes personnel from more than thirty countries, all of whom are accustomed to conducting operations in accordance with the requirements of their respective state systems, even an apparently simple issue as how to take a statement or deciding what form the statement should take can prove challenging.”404

Only the ICC and the ECCC provide for an explicit privilege for the witness against self-incrimination. The status of the person interviewed may change. A person who is interviewed as a witness may later become a suspect. Providing witnesses with a privilege against self-incrimination takes this situation into account and ensures protection against self-incrimination at the early stages of the investigation. Hence, the model set by the ICC and the ECCC should be followed by other jurisdictions under review. At the ECCC, such privilege is unqualified during the questioning of the witness by the Prosecutor. In the course of the judicial investigation, this right is qualified and the witness may be compelled to answer a question after assurances of confidentiality and immunity from use are provided. Unlike the ECCC, the ICC Statute does not explicitly state that the witness should be informed about the

403 Interview with Mr. Jordash, Defence Counsel, SCSL-11, The Hague, 7 December 2009, p. 8.
existence of this privilege prior to the commencement of the interview. Such requirement is important to ensure the effective realisation of this right.

In line with the findings regarding the interrogation of suspects and accused persons, the use of oppressive conduct (including coercion, duress, threats, torture and other forms of cruel, inhuman or degrading treatment) during witness interviews is prohibited.

Finally, a right to the free assistance of an interpreter during witness questioning is only explicitly provided for before the ICC. The more seasoned tribunals do not explicitly mention it, but it may be assumed that witnesses are provided with an interpreter if language problems arise. The ICC Statute includes a stronger protection by requiring a ‘competent’ interpreter and interpretation if a witness is questioned in any other language than the accused or suspect fully understands and speaks. It also includes a welcome addition in the form of a right to such translations prior to questioning as are necessary to meet the requirements of fairness.